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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. RIVERS EDGE MALL, INC., JOHN/JANE DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – MONMOUTH COUNTY DOCKET NO. MON-C- **CIVIL ACTION** **VERIFIED COMPLAINT TO ENFORCE A FINAL AGENCY ORDER FOR PENALTIES IN A SUMMARY PROCEEDING PURSUANT TO R. 4:67-6 and R. 4:70; and REQUEST FOR RELIEF AND THE IMPOSITION OF CIVIL PENALTIES UNDER THE SPILL ACT.**

Plaintiffs the New Jersey Department of Environmental Protection ("DEP") and the Commissioner of the New Jersey Department of Environmental Protection ("Commissioner"), (collectively, "Department"), by and through their attorney, bring this verified complaint against Defendant Rivers Edge Mall, Inc. ("Defendant"), other fictitious persons and corporations (John/Jane Does 1-10 and XYZ Corporations 1-10) and allege as follows:

STATEMENT OF THE CASE

1. Defendant Rivers Edge Mall, Inc. was incorporated in New Jersey in 1968 and acquired the property at issue in 1969. For more than two decades, Defendant has been

in violation of the law by failing to remediate hazardous soil and groundwater contamination at 401 Liberty Street, also known as Block 379, Lot 1.01, on the tax maps of Long Branch City, Monmouth County, New Jersey ("Site"). Since acquiring the Site, Defendant has primarily utilized the property as a fuel dispensing station.

2. In 1999, Paul Volkmer of Bell Environmental reported gasoline contamination in the soil at the Site surrounding underground storage tanks ("USTs"). This contamination created an ongoing threat to the residences, businesses, and waterways adjacent to the Site.

3. Subsequent soil and groundwater testing in 2004 identified hazardous substances that are components of gasoline. The soil testing results revealed benzene, ethylbenzene, and xylenes at concentrations exceeding Residential Direct Contact Soil Cleanup Criteria, while the groundwater testing identified benzene, ethylbenzene, methylene chloride, total xylenes, benzo(a)pyrene, benzo(b)fluoranthene, indeno(1,2,3-cd)pyrene, and naphthalene above the Department's Ground Water Quality Standards.

4. Petroleum products, including gasoline and its components, are hazardous substances under the Spill Act. N.J.S.A. 58:10-23.11b.

5. Gasoline and its toxic components pose threats to the environment and public health when they enter the soil and the groundwater. Human exposure to these contaminants, including through ingestion or inhalation of vapors, can cause dizziness, headaches, lung irritation, nervous system disruption, and damage to the liver, kidneys, central nervous system, and eyes. These contaminants also persist in soil for long periods of time, impeding plant growth and threatening birds and mammals with irritation and toxicity.

6. Defendant's continuing violations of environmental laws and regulations pose an ongoing risk to public health and the environment in the Long Branch community.

The community surrounding the Site has a significant minority population such that it is considered an "overburdened community" within the meaning of N.J.S.A. 13:1D-158.[1] Historically, across New Jersey, such communities have been disproportionally exposed to high-polluting facilities and to the resultant threats of high levels of air, water, soil, and noise pollution, and accompanying increased negative public health impacts. Remediation of the Site is imperative because it is located within close proximity to many residential properties and Troutmans Creek in the City of Long Branch, New Jersey.

7. Residents of all communities should receive fair and equitable treatment in matters affecting their environment, community, homes, and health without regard to race, language or income. See, e.g., Exec. Order No. 23 (April 20, 2018), N.J.A.C. 7:1C-1.1 to -10.3; Environmental Justice Law, N.J.S.A. 13:1D-157 to -161.

8. To date, Defendant has failed to remediate this contamination despite a clear legal obligation to do so.

9. In 2006, the Department determined that Defendant was also in violation of several UST regulations. On May 6, 2006, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to the Defendant for the aforementioned regulations, ordering Defendant to perform enumerated compliance obligations, and assessing a civil administrative penalty.

10. On September 10, 2010, Administrative Law Judge ("ALJ") Dennis P. Blake entered an Order ("OAL Order") finding Defendant failed to delineate the Site's soil and

[1] "Overburdened community means any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency." N.J.S.A. 13:1D-158. The Site is located within an area of the City of Long Branch that is listed as an overburdened community on the Department's website, pursuant to N.J.S.A. 13:1D-159.

groundwater contamination in violation of N.J.A.C. 7:26E-4.1(b) and ordering Defendant to pay a $5,500.00 penalty for said violation.

11. The OAL Order became a Final Agency Order on or about January 25, 2011 (hereinafter "2011 FAO").

12. To date, Defendant has failed to pay the $5,500.00 penalty awarded to the Department for Defendant's violation of N.J.A.C. 7:26E-4.1(b).

13. The Department therefore brings this civil action pursuant to the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 et seq.; the Brownfield and Contaminated Site Remediation Act ("Brownfield Act"), N.J.S.A. et seq.; the Site Remediation and Reform Act ("SRRA"), N.J.S.A. 58:10C-1 to -29; the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C; and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, to compel Defendant to remediate the discharge of hazardous substances at the Site and pay civil penalties for their failure to comply with applicable laws.

14. The Department also seeks to enforce the 2011 FAO via summary action pursuant to Rule 4:67-1 and Rule 4:70 to compel Defendant to pay the $5,500.00 civil administrative penalty ordered therein.

THE PARTIES

15. The Department is a principal department within the Executive Branch of the State government, with its principal offices at 401 East State Street, Trenton, Mercer County, New Jersey.

16. The Department's enabling legislation, N.J.S.A. 13:D-1 to-19, vests it with the authority to conserve and protect natural resources, protect the environment, prevent pollution, and protect the public health and safety. The Department's enabling legislation, and the Spill

Act, both empower the Department to institute legal proceedings seeking injunctive relief, including compelling remediation, and pursuing civil penalties in Superior Court.

17. The Commissioner is the Commissioner of DEP. N.J.S.A. 58:10-23.11b and N.J.S.A. 58:10A-3. In this capacity, the Commissioner is vested by law with various powers and authority, including those conferred by DEP's enabling legislation, N.J.S.A. 13:1D-1 through -19.

18. Defendant Rivers Edge Mall, Inc. was incorporated in New Jersey in 1968 and acquired the Site in 1969. Defendant's business address is 3 Liberty Street, Long Branch, New Jersey 07740. Upon information and belief, Defendant owned the Site until the present except for a brief period when another party acquired title from December 4, 2019 through February 13, 2020.[2]

19. Defendant's president and registered agent is Shaheen Henry Shaheen of 6 Tuxedo Road, Rumson, New Jersey 07760.

20. "XYZ Corporations" 1-10, these names being fictitious, are entities with identities that cannot be ascertained as of the filing of this Complaint, certain of which are corporate successors to, predecessors of, insurers of, or are otherwise related to the Defendant.

21. "John and/or Jane Does" 1-10, these names being fictitious, are natural individuals whose identities cannot be ascertained as of the filing of this Complaint, certain of whom are partners, officers, directors, and/or responsible corporate officials of, or are otherwise related to, Defendant and/or one or more of the "XYZ Corporation" defendants.

[2] Limerick Associates, LLC ("Limerick") acquired title to the Site on December 4, 2019 via foreclosure and sheriff's sale. Limerick sold the Site back to Defendant on February 13, 2020.

FACTUAL ALLEGATIONS

History of the Site and Violations through 2009

22. The Site operated as a gas station under Defendant's ownership for decades, utilizing numerous USTs containing gasoline, diesel, heating oil, and waste oil. Upon information and belief, no businesses currently operate on the Site.

23. The Site consists of approximately 0.34 acres of real property located in a residential area adjacent to many residential properties, including single-family homes, apartment buildings, and a restaurant. It is bounded by a vacant lot to the west; Liberty Street to the south; Atlantic Avenue to the east; and Troutmans Creek to the north.

24. On October 7, 1999, Paul Volkmer of Bell Environmental notified the Department that gasoline had been discharged from the UST Facility at the Site into the soil.

25. On October 27, 1999, the Department conducted a facility inspection of the three (3) 8,000-gallon gasoline USTs registered at the Site (Tanks 0C1, 0C2, and 0C3). During the inspection, DEP observed free petroleum product in groundwater monitoring wells located on the Site.

26. On October 29, 1999, the Department issued a Field Notice of Violation to Defendant for the failure to correctly mark the fill ports; failure to have a release response plan; failure to perform release detection monitoring; failure to have overfill protection; and failure to register a waste oil underground storage tank at the Site. The Field Notice of Violation required Defendant to correct the violations at the Site within thirty (30) days.

27. On August 8, 2000, the Department notified Defendant that a response to the Field Notice of Violation had not been received and directed Defendant to close or upgrade the USTs within seven (7) days.

28. On July 24, 2003, the Department notified Defendant that no response to

the Field Notice of Violation or August 8, 2000 letter had been received and directed Defendant to conduct a receptor evaluation and submit a response within thirty (30) days.

29. On February 6, 2004, the Department issued a Notice of Violation for Defendant's failure to upgrade the underground storage tank systems at the Site pursuant to N.J.A.C. 7:14B-4.2; perform an investigation of a suspected release pursuant to N.J.A.C 7:14B-7.1; conduct a receptor evaluation pursuant to N.J.A.C. 7:26E-4.4, and register the waste oil underground storage tank system pursuant to N.J.A.C. 7:14B-2.1.

30. On April 7, 2004, Defendant updated the UST registration at the site to add one (1) 1,000-gallon diesel UST (Tank D1) and one (1) 550-gallon waste oil UST (Tank W01).

31. On September 2, 2004, Focus Environmental, Inc. ("Focus") submitted to the Department a remedial investigation report for the Site. The report indicated that, beginning on April 27, 2004, the five tanks on the Site (Tanks 0C1, 0C2, 0C3, D1 and W01) had been removed, and all associated piping and dispenser pads were removed and investigated.

32. In response, the Department issued a letter to Defendant on September 21, 2004 stating that the aforementioned report did not resolve the NOV against Defendant. Defendant remained obligated to "delineate the horizontal and vertical extent of contamination previously detected"; determine the level of hexavalent chromium in the soil through alkaline digestion; "submit documentation from the fill provider certifying that the material used as [partial] backfill was free of contaminants and met all requirements pursuant to N.J.A.C. 7:26E-6.4(b)"; conduct a ground water investigation in accordance with N.J.A.C. 7:26E-3.7 and/or 4.4 "[s]ince ground water was encountered within the excavation… and soil contamination was identified"; install and sample water monitoring wells, submitting results to DEP; perform a receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)(3)(i) through

(ix) "[i]f ground water contamination is identified in excess of the Ground Water Quality Standards, N.J.A.C. 7:9-6"; conduct a well search as part of the receptor evaluation; complete a baseline ecological evaluation for each contaminated site or area of concern in accordance with N.J.A.C. 7:26E-3.11; and submit a Remedial Action Selection Report that may be included as part of the remedial action work plan.

33. On September 14, 2005, the Department sent a letter to Defendant noting its failure to submit the required remedial action workplan.

34. Focus notified the Department on September 21, 2004 that a baseline ecological evaluation was performed and found that there were "signs of ecological concern associated with the on-site contamination" because of the creek adjacent to the Site and because of a nearby wetland. Focus further noted "[a] well search has been ordered for the subject site and the results of the well search will be forwarded to your office as soon as they are received and reviewed."

35. On December 1, 2005, the Department issued an additional NOV to Defendant. The NOV confirmed the aforementioned UST violations remained unresolved during a compliance evaluation conducted by the Department on October 7, 2005.

36. On May 16, 2006, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to Defendant for violating the UST Act, N.J.S.A. 58:10A-21 to -37, and the regulations promulgated thereunder, specifically N.J.A.C. 7:14B-8.2(a)(1), 7:26E-4.4(h)(3), 7:26E-4.1(b), and 7:14B-8.3(c). The AONOCAPA required Defendant to submit an updated UST Registration Questionnaire within thirty (30) days, perform a well search and surface water investigation within sixty (60) days, fully delineate soil and groundwater contamination at the Site within sixty (60) days, and submit a remedial investigation report and remedial action workplan within sixty (60) days. It

further assessed a civil administrative penalty against Defendant in the amount of $11,000.00 pursuant to the civil penalty schedule under former N.J.A.C. 7:26C et. seq., including a penalty of $ 5,500.00 for failure to complete a well search and receptor evaluation pursuant to N.J.A.C. 7:26E-4.4(h)(3) and a penalty of $ 5,500.00 for the failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b).

37. On June 12, 2006, Defendant requested an adjudicatory hearing to contest the AONOCAPA; the hearing request was granted by the Department and the matter was transmitted to the Office of Administrative Law (“OAL”).

38. On November 15, 2007, Roux Associates, Inc. ("Roux") sent the Department an email on behalf of Defendant indicating that a report was previously submitted to the Department on September 26, 2007. The Roux email stated the report summarized “future planned activities [including] monitoring well installation, ground water sampling and completion of a receptor evaluation (which will include a well search and surface water and other required sampling).”

39. On February 3, 2009, Keystone E-Sciences Group, Inc. (“Keystone”), another firm retained by Defendant, submitted a schedule for performing remedial activities. The schedule confirmed the monitoring wells had neither been installed nor sampled, a receptor evaluation and well search had not been completed, and a remedial investigation report had neither been prepared nor submitted.

40. On June 30, 2009, Keystone submitted a proposed remedial investigation report and remedial action workplan to the Department. The remedial investigation report indicated Roux had performed a soil and groundwater investigation in March 2007 and that groundwater samples confirmed groundwater had been contaminated. The soil sampling in the area around the three 8,000-gallon gasoline tanks revealed the presence of elevated

levels of benzene, ethylbenzene, and xylenes at concentrations exceeding the applicable New Jersey Soil Cleanup Criteria. Benzene, ethylbenzene, methylene chloride, total xylenes, benzo(a)pyrene, benzo(b)fluoranthene, indeno(1,2,3-cd)pyrene, and naphthalene were also all detected in the groundwater above the Ground Water Quality Standards at that time.

41. The remedial investigation report further indicated Roux had performed a surface water investigation in 2008 and a receptor evaluation and well search in 2009.

42. The Department then issued a "Notice of Deficiency" to Defendant after receiving the June 30, 2009 remedial investigation report and the remedial action workplan, identifying the following deficiencies with the aforementioned reports:

a. Failure to include a sampling results summary table, including a table in electronic format that conforms to the requirements of N.J.A.C. 7:26E-4 in the Remedial Investigation Report. Specifically, the electronic data was submitted in an improper format;

b. Failure to submit the signatures and certifications in accordance with N.J.A.C. 7:26C-1.2. Specifically, the required UST Report Certification Form was not submitted with the report; and

c. Failure to restore all areas subject to remediation to pre-remediation conditions. Specifically, clean fill documentation had not been provided.

43. The Notice of Deficiency required Defendant to submit a corrected report within ninety (90) days after receiving the notice, noting that a failure to do so within the specified time frame would be considered by the Department to be violations that may subject Defendant to additional penalties.

2010 OAL Order and 2011 Final Agency Order

44. On September 10, 2010, ALJ Blake entered an Order finding Defendant failed to delineate the soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b) and ordering Defendant to pay a $5,500.00 civil administrative penalty for said violation.

45. The OAL Order also concluded that more evidence needed to be collected to determine whether the Department was entitled to an additional $5,500.00 penalty assessed against Defendant for the alleged failure to perform a surface water investigation under N.J.A.C. 7:26E-4.4(h)(3).

46. The Department ultimately withdrew the $5,500.00 penalty assessment for Defendant's alleged violation of N.J.A.C. 7:26E-4.4(h)(3) on December 10, 2010, thereby resolving the final contested matter before the OAL.

47. The Commissioner did not reject or modify the OAL Order within forty-five (45) days of the end of the contested case. Accordingly, the OAL Order became a Final Agency Order on or around January 24, 2011 pursuant to N.J.A.C. 1:1-18.6.

48. Likewise, Defendant did not file any appeal of the 2011 FAO within forty-five (45) days in accordance with Rule 2:4-1(b).

49. To date, Defendant has failed to pay the $5,500.00 civil administrative penalty awarded to the Department for Defendant's violation of N.J.A.C. 7:26E-4.1(b).

50. Following the conclusion of the OAL matter concerning UST violations, Defendant has since violated its statutory and regulatory obligations to remediate the Site under the Brownfield Act and corresponding regulations. Despite the many reported hazardous substances discharged at the Site, Defendant remains recalcitrant in fully investigating and remediating the contamination.

Spill Act Violations

51. On May 7, 2009, New Jersey Governor Jon Corzine signed SRRA, N.J.S.A. 58:10C-1 to -29, which provided sweeping amendments to the Brownfield Act, N.J.S.A. 58:10B-1 to -20. Under SRRA, site remediation by responsible parties, and remediation oversight by the Department, now included:

a. the establishment of a Licensed Site Remediation Professional ("LSRP") program and LSRP Board to issue licenses to qualified individuals tasked with overseeing the remediation process;

b. an affirmative obligation on persons to remediate any discharge for which they would be liable pursuant to the Spill Act;

c. the Department was required to establish mandatory remediation timeframes for the completion of key phases of site remediation; and

d. the Department was required to maintain direct Department oversight in cases where the remediating party was recalcitrant in conducting a timely cleanup.

52. As the current owner of the contaminated Site and the owner at the time the discharge of hazardous substances occurred, Defendant is liable for the remediation of hazardous substances discharged at the Site under N.J.S.A. 58:10-23.11g(c)(1). Remediation of the Site is imperative because it is located within close proximity to residential properties and Troutmans Creek in the City of Long Branch, New Jersey.

53. On December 30, 2011, the Department issued a letter to Defendant that further identified the mandatory timeframes for completing the required remediation in accordance with SRRA.

54. Under the Brownfield Act and the corresponding regulations, including the

Administrative Requirements for the Remediation of Contaminated Sites ("ARRCS"), N.J.A.C. 7:26C, the remediating party must initiate and complete the cleanup under the direction of an LSRP, who has responsibility for oversight of the environmental investigation and remediation. The Department monitors the remediation progress and the actions of LSRPs by requiring their submittal of forms and reports as remediation milestones are reached.

55. On January 27, 2012, the Department issued Defendant a "Compliance Assistance Alert." In this letter, the Department notified Defendant it had failed to submit an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.15 and that the mandatory time frame for same was March 1, 2012. The Department further indicated Defendant would be subject to "direct oversight" requirements related to missed mandatory remediation timeframes authorized by SRRA, including the requirements to establish a remediation trust fund and implement a Department-selected remedial action.

56. In May 2012, the Department issued Defendant a letter emphasizing Defendant needed to hire an LSRP as soon as possible. The letter again identified the mandatory timeframes under which Defendant was obligated to remediate the Property.

57. On May 14, 2012, the Department received a letter from Keystone signed by Daniel E. Erdman, P.G., REA. In the letter, Mr. Erdman stated he was unable to certify an LSRP Notification of Retention form on Defendant's behalf for several reasons, as Defendant had yet to pay oversight costs and applicable fees, hadn't yet posted a remediation funding source, and had not formally retained Keystone as Defendant's LSRP.

58. On October 10, 2013, the Department issued Defendant a Final Notice to make remittance of the overdue LSRP Annual Remediation Fees and Oversight Charges. The notice further stated that, in the event Defendant failed to make a full payment within the established timeframe, the Department may file an action in New Jersey Superior Court to

recover these costs and obtain maximum statutory penalties under N.J.S.A. 58:10-23.11u, which authorizes the Department to seek civil penalties up to $50,000.00 per day. Each day that a violation continues is a separate and distinct offense.

59. The Defendant repeatedly failed to respond to the Department's many alerts and letters, including the January 27, 2012 Compliance Assistance Alert or the October 10, 2013 Final Notice.

60. As both the current owner of the Site and the owner at the time the discharge of hazardous substances occurred, Defendant remains in violation of its obligation to remediate the Site pursuant to, among other statutes and regulations, the Spill Act, the Brownfield Act as amended by SRRA, the ARRCS (N.J.A.C. 7:26C), and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

61. Defendant has disregarded the Department's notices, and its obligations under the law, to remediate the hazardous gasoline components in the soil and groundwater of the Site.

62. To date, the Site is not in compliance with the requirements of the Spill Act, the Brownfield Act, SRRA, and the regulations promulgated thereto. Defendant has not complied with SRRA's Direct Oversight requirements, retained an LSRP, submitted the requisite investigative reports, or remediated the existing contamination on the Site.

COUNT I

VIOLATION OF THE SPILL ACT, THE BROWNFIELD ACT, AND THE SITE REMEDIATION REFORM ACT

63. The Department repeats each allegation in the preceding paragraphs as though fully set forth herein.

64. As both the current owner of the Site and the owner at the time of the

discharge, Defendant is a "person" within the meaning of N.J.S.A. 58:10-23.11b.

65. The strict liability provision of the Spill Act, N.J.S.A. 58:10-23.11g.c.(1), provides in pertinent part:

> [A]ny 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. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c. 141 (C:58:10-23.11f).

66. Contamination, as defined by the Spill Act, means any discharged hazardous substance, hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3). N.J.S.A. 58:10-23.11b.

67. The contamination at the Site and emanating therefrom has not been remediated in violation of the Spill Act. N.J.S.A. 58:10-23.11.c.

68. Pursuant to the Spill Act, any person who discharges a hazardous substance, or is in any way responsible for any hazardous substance, shall be liable, jointly and severally, without regard to fault for all cleanup and removal costs no matter by whom incurred, except as otherwise provided in N.J.S.A. 58:10-23.11.g.12. N.J.S.A. 58:10-23.11g.c(1).

69. Effective January 6, 1998, the Legislature enacted the Brownfield Act, N.J.S.A. 58:10B-1 to -20.

70. As amended by the SRRA, N.J.S.A. 58:10C-1 to -29, the Brownfield Act provides in part that a discharger of a hazardous substance or a person in any way responsible for a hazardous substance under the Spill Act, N.J.S.A. 58:10-23.11g.c(1), has an affirmative obligation to remediate discharges of hazardous substances. N.J.S.A. 58:10B-1.3.a.

71. Petroleum products, including gasoline, are hazardous substances under the Spill Act. N.J.S.A. 58:10-23.11b.

72. Defendant is a "person" as defined in the Brownfield Act, N.J.S.A. 58:10B-1.3a and, therefore, is required to remediate the hazardous substances at the Site.

73. Any person who violates the Spill Act, or who fails to pay a civil administrative penalty in full or to agree to a schedule of payments therefor, shall be subject to a civil penalty of up to $50,000.00 per day for each violation, and each day's continuance of the violation constitutes a separate violation. N.J.S.A. 58:10-23.11u(a); (d).

74. Defendant failed to remediate the hazardous substances discharged at the Site and all other areas to which any hazardous substance discharged on the Site has migrated in violation of the Spill Act and the Brownfield Act. See N.J.S.A. 58:10-23.11.c; N.J.S.A. 58:10B-1.3.a.

75. Defendant was required to submit an LSRP Retention Form by May 7, 2012. To date, no such form has been submitted to the Department.

76. Defendant was also required to conduct and submit an initial receptor evaluation by March 1, 2012. To date, no such evaluation has been submitted to the Department.

77. The ARRCs established the requisite timeframes for completing a remedial investigation. N.J.A.C. 7:26C. The remedial investigation was not completed by March 1, 2017.

78. Defendant's failure to submit a remedial investigation report by the March 1, 2019 mandatory deadline triggered compulsory Direct Oversight.

79. The person(s) responsible for conducting the remediation of a property in Direct Oversight must establish and maintain a Remediation Funding Source ("RFS") pursuant to N.J.A.C. 7:26C-5.2(k), among other things.

80. Defendant has failed to establish or maintain an RFS or comply with other Direct Oversight requirements.

81. The mandatory timeframe in which to submit a remedial action report was February 28, 2024. See N.J.A.C. 7:26C-3.3(b)(6). Defendant failed to submit a remedial action report by that date.

82. As a person responsible for remediating hazardous substances on the Site, Defendant is required to submit an annual remediation fee to the Department, but has failed to do so in 2022, 2023 and 2024. See N.J.A.C. 7:26C–2.3(a)(4), -4.3(a)(4), –4.9.

WHEREFORE, the Department demands judgment against Defendant:

a. Finding Rivers Edge Mall, Inc. liable for failing to remediate the Site and compelling Defendant to remediate the Site pursuant to N.J.S.A. 58:10B-1.3a;

b. Finding Rivers Edge Mall, Inc. in violation of the Spill Act, the Brownfield Act, SRRA, and their implementing regulations by:

   i. Failing to retain an LSRP;

   ii. Failing to submit the initial receptor evaluation by the mandatory timeframe of March 1, 2012;

   iii. Failing to submit a remedial investigation report by the mandatory timeframe of March 1, 2019;

   iv. Failing to remediate the Site and submit a remedial action report by the mandatory timeframe of February 28, 2024; and

   v. Failing to comply with the Department's Direct Oversight requirements.

c. Ordering Rivers Edge Mall, Inc. to comply with its obligations under the Spill

Act, the Brownfield Act, SRRA, and their implementing regulations by:

i. Retaining an LSRP, as required by N.J.A.C. 7:26C- 2.3(a)(1) and (2), and notify the Department of the LSRP's name and license information and the scope of remediation;

ii. Submitting an initial receptor evaluation in accordance with N.J.A.C. 7:26E-1.12;

iii. Conducting a remedial investigation and submitting a remedial investigation report pursuant to N.J.A.C. 7:26E-4.9;

iv. Submitting a cost estimate to the enforcement manager, pursuant to N.J.A.C. 7:26C- 14.2(b)(2)(i) and N.J.A.C. 7:26C-5.10(a);

v. Establishing and maintaining a remediation funding source, pursuant to N.J.A.C. 7:26C- 14.2(b)(2)(ii) and N.J.A.C. 7:26C-5.2(k); and

vi. Submitting a Public Participation Plan, pursuant to N.J.A.C. 7:26C-14.2(b)(2)(iii) and N.J.S.A. 58:10C-27c(7);

vii. Submitting a remediation funding source surcharge, pursuant to N.J.A.C. 7:26C-14.2(b)(5) and N.J.A.C. 7:26C-5.9; and

d. Ordering Rivers Edge Mall, Inc. to pay all required fees, including the $10,380.00 in annual remediation fees accrued in 2022, 2023, and 2024, pursuant to N.J.A.C. 7:26C- 2.3(a)(4), and to submit an updated Annual Remediation Fee Reporting Form.

e. Assessing civil penalties against Rivers Edge Mall, Inc. pursuant to N.J.S.A. 58:10-23.11u for its failure to remediate the Site and all other areas to

which any hazardous substance discharged on the Site has migrated;

f. Ordering Rivers Edge Mall, Inc. to pay a civil penalty pursuant to N.J.S.A. 58:10-23.11u(a) and (d) in the amount the Court deems just and proper;

g. Reserving the Department's right to bring a claim in the future for natural resource damages arising out of the discharge of hazardous substances at the Site;

h. Reserving the Department's right to bring a claim for any future incurred costs and fees in this action; and

i. Awarding the Department any other relief that the Court deems just and proper.

COUNT II

ENFORCEMENT OF THE FAO AGAINST RIVERS EDGE MALL, INC. ON A SUMMARY BASIS

83. The Department repeats each allegation in the preceding paragraphs as though fully set forth herein.

84. Pursuant to N.J.A.C. 1:1-18.6, because the Commissioner did not take any action to adopt, modify, or reject the OAL Order within forty-five (45) days of the end of the contested case, the OAL Order automatically became a Final Agency Order on or around January 24, 2011. Likewise, Defendant did not file any appeal of the 2011 FAO within forty-five (45) days in accordance with Rule 2:4-1(b).

85. The 2011 FAO required Defendant to pay the civil administrative penalty in the amount of $5,500.00 for Defendant's violation of N.J.A.C. 7:26E-4.1(b).

86. Defendant's failure to pay the Department the civil administrative penalty of $5,500.00 in a timely manner constitutes a violation of the 2011 FAO.

87. Pursuant to Rule 4:67-6(b)(1), the Department is entitled to summary enforcement of the 2011 FAO in Superior Court.

WHEREFORE, the Department demands judgment against Defendant:

a. Finding Rivers Edge Mall, Inc. in violation of the 2011 FAO; and

b. Ordering Rivers Edge Mall, Inc. to, within thirty (30) days, comply with the terms of the 2011 FAO by paying the Department $5,500.00 in civil administrative penalties for their violation of N.J.S.A. 7:26E-4.1(b).

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey Department of Environmental Protection

By: _____
Jesse J. Little
Deputy Attorney General

Dated: 10/22/2024

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, the Court is advised that Jesse J. Little, Deputy Attorney General, is hereby designated as trial counsel for Plaintiffs in this action.

CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

Undersigned counsel hereby certifies, in accordance with Rule 4:5-1(b)(2), that the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to Plaintiffs at this time, nor is any non-party known to Plaintiffs at this time who should be joined in this action pursuant to Rule 4:28, or who is subject to joinder pursuant to Rule 4:29-1. If, however, any such non-party later becomes known to Plaintiff Department of Environmental Protection, an amended certification shall be filed and served on all other parties and with this Court in accordance with Rule 4:5-1(b)(2).

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey Department of Environmental Protection

By: _____
Jesse J. Little
Deputy Attorney General

Dated: 10/22/2024

VERIFICATION OF PLEADING

I, Quentin Zorn, being of full age, certify as follows:

1. I am employed by the New Jersey Department of Environmental Protection within Contaminated Site Remediation and Redevelopment, Bureau of Enforcement and Investigations.

2. I am the enforcement manager assigned to the Site.

3. I have read the Verified Complaint.

4. I certify that the factual allegations contained in the Verified Complaint are true and correct to the best of my knowledge.

5. I am aware that if the foregoing statements made by me are willfully false, I may be subject to punishment.

Quentin Zorn
Enforcement Manager
Bureau of Enforcement and Investigations
Contaminated Site Remediation & Redevelopment

Dated: 10/21/2024

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street, PO Box 093 Trenton, New Jersey
08625-0093 Attorney for Plaintiffs

By: Jesse J. Little
Deputy Attorney General
Attorney ID: 412022022
Jesse.Little@law.njoag.gov
(609) 376-2740

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. RIVERS EDGE MALL, INC., JOHN/JANE DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – MONMOUTH COUNTY DOCKET NO. MON-C- **CIVIL ACTION** **ORDER TO SHOW CAUSE**

This summary action having been opened to the Court by Matthew J. Platkin, Attorney General of New Jersey, by Jesse J. Little, Deputy Attorney General appearing, attorney for Plaintiffs New Jersey Department of Environmental Protection ("DEP") and the Commissioner of the New Jersey Department of Environmental Protection ("Commissioner") (collectively, "Department"), seeking relief on the return date by way of summary proceeding, pursuant to R. 4:67 and R. 4:70, based upon the facts set forth in the verified complaint filed herewith; and for good cause being shown;

IT IS on this _____ day of _____, 2024;

ORDERED that Defendant appear and show cause before the Honorable _____, Superior Court of New Jersey, Chancery Division, at the Monmouth County Courthouse, 71 Monument Street, Freehold, New Jersey 07728, on the _____day of _____, 2024 at _____ o'clock in the _____ noon, or as soon thereafter as counsel may be heard, why an order should not be entered:

1. Finding Defendant in violation of the January 24, 2011 Final Agency Order;

2. Enforcing the January 24, 2011 Final Agency Order;

3. Ordering Defendant to pay a penalty in the amount of $5,500.00 pursuant to the January 24, 2011 Final Agency Order; and

4. Granting Plaintiffs such other relief as this Court deems just and proper.

IT IS FURTHER ORDERED that within _____ days of this date, Plaintiffs' attorney shall serve Defendant with true and correct copies of this Order to Show Cause, Verified Complaint, supporting certifications and supporting brief by regular and certified mail, return receipt requested; and

IT IS FURTHER ORDERED that Plaintiffs must file with the court its proof of service of the pleadings on Defendant no later than three days before the return date; and

IT IS FURTHER ORDERED that Defendant shall file a written answer, an answering affidavit or a motion returnable on the return date of this Order to Show Cause, and shall serve copies of the same upon Plaintiffs' attorney by _____, 2024. The answer, answering affidavit or motion, as the case may be, must be filed with the Clerk of the Superior Court in the county listed above and a copy of the opposition papers must also be sent directly to the chambers of Judge _____; and

IT IS FURTHER ORDERED that Plaintiffs must file and serve any written reply to the Defendant's opposition by _____, 2024. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____;and

IT IS FURTHER ORDERED that that if Defendant does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date, and the relief may be granted by default, provided that Plaintiffs filed its proof of service and a proposed form of order at least three days prior to the return date; and

IT IS FURTHER ORDERED that if Plaintiffs have not already done so, Plaintiffs shall submit a proposed form of order addressing the relief sought on the return date no later than three days before the return date; and

IT IS FURTHER ORDERED that Defendant take notice that Plaintiffs have filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit or a motion returnable on the return date of the order to show cause and proof of service within 35 days from the date of service of this order to show cause.

If Defendant is unable to obtain an attorney, Defendant may contact a Lawyer Referral Service or, if Defendant cannot afford to pay for an attorney, contact a Legal Services Office. The telephone numbers for these services in the county in which this action is pending are: (201) 488-0044 (Lawyer Referral Service) and (201) 487-2166 (Legal Services Office).

IT IS FURTHER ORDERED that the Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the parties are advised by the Court to the contrary no later than ____ days before the return date.

_____

Hon.

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street, PO Box 093 Trenton, New Jersey
08625-0093 Attorney for Plaintiffs

By: Jesse J. Little
Deputy Attorney General
Attorney ID: 412022022
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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. RIVERS EDGE MALL, INC., JOHN/JANE DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – MONMOUTH COUNTY DOCKET NO. MON-C- **CIVIL ACTION** **PROPOSED ORDER**

This matter having been opened to the Court by Matthew J. Platkin, Attorney General of New Jersey, attorney for Plaintiffs New Jersey Department of Environmental Protection ("DEP") and the Commissioner of the New Jersey Department of Environmental Protection ("Commissioner") (collectively, "Department") (Jesse J. Little, appearing), with notice having been given to Defendant; and the Court having considered the Order to Show Cause and supporting brief; and for good cause shown;

IT IS on this _____ day of _____, 2024;

ORDERED that Defendant Rivers Edge Mall, Inc. is hereby found to be in violation of the

January 24, 2011 Final Agency Order; and

ORDERED that the January 24, 2011 Final Agency Order is hereby enforced, wherein Defendant must pay a penalty in the amount of $5,500.00 for Defendants' violation of N.J.A.C. 7:26E-4.1(b) within thirty (30) days.

IT IS FURTHER ORDERED that within seven (7) days of this date, Plaintiffs' attorney shall serve Defendant with a true and correct copy of this Order, if not served via eCourts.

_____ _____

Hon.

__ Opposed

__ Unopposed

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE COMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. RIVERS EDGE MALL, INC., JOHN/JANE DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – MONMOUTH COUNTY DOCKET NO. MON-C-

BRIEF IN SUPPORT OF PLAINTIFF'S VERIFIED COMPLAINT AND ORDER TO SHOW CAUSE

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
PO Box 093
Trenton, NJ 08625-0093
Attorney for Plaintiff,
Dept. of Environmental Protection

Jesse J. Little (412022022)
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The New Jersey Department of Environmental Protection ("Department" or "DEP") brings this partial summary action against Defendant Rivers Edge Mall, Inc. ("Defendant") to enforce a 2011 Final Agency Order ("FAO") against Defendant.

The FAO was issued to Defendant as a result of its failures to comply with environmental laws and regulations associated with their ownership of the contaminated property located at 401 Liberty Street, Long Branch City, Monmouth County, New Jersey ("Site"). In 1999, gasoline contamination was reported in the soil at the Site surrounding underground storage tanks ("USTs") operated by Defendant. This hazardous contamination created and remains an ongoing threat to the residences, businesses, and waterways adjacent to the Site, which is located in an overburdened community.[1]

In 2006, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to Defendant. The AONOCAPA identified four (4) distinct violations the New Jersey Underground Storage of Hazardous Substances Act ("UST Act"), N.J.S.A. 58:10A-21 -37, and the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:-10-23.11 – 23.14, and the regulations promulgated thereto. The AONOACAPA imposed civil administrative totaling $11,000.00.

On September 10, 2010, Administrative Law Judge Dennis P. Blake entered an Order finding Defendant failed to delineate the Site's soil and groundwater contamination in violation of N.J.A.C. 7:26E-4.1(b) and ordering Defendant to pay a $5,500.00 penalty for said violation. The

[1] An "overburdened community" is defined as "any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency." N.J.S.A. 13:1D-158. The Site is located within an area of Long Branch City, Monmouth County, New Jersey that is listed as an overburdened community on the Department's website as per N.J.S.A. 13:1D-159.

Order became a Final Agency Order on or about January 24, 2011.. To date, Defendant remains in violation of the 2011 FAO by failing to pay the $5,500.00 penalty awarded to the Department for Defendant's violation of N.J.A.C. 7:26E-4.1(b).

The Department now seeks an order enforcing the FAO against Defendant pursuant to Rule 4:67-6 and Rule 4:60, requiring Defendant to pay the civil administrative penalty previously ordered by the OAL, and imposing additional civil penalties pursuant to N.J.S.A. 58:10A-10(e) and Rule 4:70 for failing to comply with the FAO.

STATEMENT OF FACTS[2]

Defendant Rivers Edge Mall, Inc. was incorporated in New Jersey in 1968 and acquired the Site in 1969. Verified Complaint at ¶ 1, 18. The Site historically functioned as a fuel dispensing station, utilizing numerous underground storage tanks ("USTs") containing gasoline, diesel, heating oil, and waste oil. Id. at ¶ 22. With the exception of an interstice of ownership from December 4, 2019 to February 13, 2020, Defendant has continuously possessed the Site since 1968. Id. at ¶ 18.

On October 27, 1999, the Department conducted a facility inspection of the three USTs on the Site. During the inspection, DEP observed free petroleum product in groundwater monitoring wells located on the Site. Id. at ¶ 25. On October 29, 1999, the Department issued a Field Notice of Violation to Defendant for the failure to correctly mark the fill ports; failure to have a release response plan; failure to perform release detection monitoring; failure to have overfill protection; and failure to register a waste oil underground storage tank at the site. The Field Notice of Violation required Defendant to correct the violations at the Site within thirty days. Id. at ¶ 26. On July 24, 2003, the Department also directed Defendant to conduct a receptor evaluation and submit a

[2] This is the summary action portion of this matter which also contains claims that cannot be pursued summarily. Accordingly, with the exception of a brief history of the discharges at the Site, only the facts required to be verified are set forth herein.

response within thirty days. Id. at ¶ 28.

On February 6, 2004, the Department issued a Notice of Violation to Defendant for several distinct violations, including the failure to perform an investigation of a suspected release pursuant to N.J.A.C 7:14B-7.1 and conduct a receptor evaluation pursuant to N.J.A.C. 7:26E-4.4. Id. at ¶ 29. On April 7, 2004, Defendant updated the UST registration at the Site, which, in addition to the three gasoline tanks at the Site, now included one 1,000-gallon diesel tank and one 550-gallon waste oil tank. Id. at ¶ 30.

On May 16, 2006, the Department issued an AONOCAPA to Defendant for violating the UST Act, N.J.S.A. 58:10A-21 to -37, and the regulations promulgated thereunder, specifically N.J.A.C. 7:14B-8.2(a)(1), 7:26E-4.4(h)(3), 7:26E-4.1(b), and 7:14B-8.3(c). Id. at ¶ 36. The AONOCAPA required Defendant to submit an updated UST Registration Questionnaire within thirty days, perform a well search and surface water investigation within sixty days, fully delineate soil and groundwater contamination at the Site within sixty days, and submit a remedial investigation report with supporting documents within sixty days. The AONOCAPA imposed civil administrative penalties against Defendant for two of the four violations cited in the AONOCAPA, totaling $11,000.00. The Department charged Defendant a penalty of $5,500.00 for failing to complete a well search and receptor evaluation pursuant to N.J.A.C. 7:26E-4.4(h)(3) and a penalty of $5,500.00 for failing to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b). Id.

On September 10, 2010, Judge Blake entered an Order finding Defendant failed to delineate the soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b) and ordering Defendant to pay a $5,500.00 civil administrative penalty for said violation. Exhibit A at 15-16.

The September 10, 2010 Order also found that more evidence needed to be collected by the Department to determine whether the Department was entitled to an additional $5,500.00 penalty assessed against Defendant for the alleged failure to perform a surface water investigation

under N.J.A.C. 7:26E-4.4(h)(3). Id. The Department instead withdrew the $5,500.00 penalty assessment for Defendant's alleged violation of N.J.A.C. 7:26E-4.4(h)(3) on December 10, 2010, thereby resolving the final contested matter before the OAL. Exhibit B at 2.

The Commissioner of the Department of Environmental Protection did not reject or modify the September 10, 2010 Order within forty-five (45) days of the end of the contested case. Verified Complaint at ¶ 47. Accordingly, the September 10, 2010 Order became a Final Agency Order on or around January 24, 2011 pursuant to N.J.A.C. 1:1-18.6. Id. Defendant did not file any appeal of the 2011 Final Agency Order within forty-five (45) days in accordance with Rule 2:4-1(b). Id. at ¶ 48.

To date, Defendant remains in violation of the 2011 FAO by never paying the Department the $5,500.00 civil administrative penalty awarded to the Department for Defendant's violation of N.J.A.C. 7:26E-4.1(b). Id. at ¶ 49.

LEGAL ARGUMENT

POINT I:

THE DEPARTMENT IS ENTITLED TO AN ORDER ENFORCING THE 2011 FAO.

The Department seeks enforcement of the 2011 FAO pursuant to Rule 4:67. Rule 4:67-6 applies to "all actions by a state administrative agency... brought to enforce a written order or determination made by it, whether final or interlocutory, and whether the order to be enforced requires the payment of money or imposes a non-monetary requirement or includes a combination of monetary and non-monetary penalties." R. 4:67-6.

Rule 4:67-6(c)(3) states: "[t]he validity of an agency order shall not be justiciable in an enforcement proceeding." R. 4:67-6(c)(3). In a summary action to enforce an agency's written order or determination, such as the case at bar, Rule 4:67-6(c)(3) does not permit any review of

the validity of the underlying agency order. In re Valley Road Sewerage Co., 295 N.J. Super. 278, 290 (App. Div. 1996); State Farm v. Dep't of Pub. Advoc., 227 N.J. Super. 99, 130 (App Div. 1988). Rather, pursuant to Rule 2:2-3(a)(2), the Appellate Division has exclusive jurisdiction to review the merits of final state agency determinations. DEP v. Mazza & Sons, Inc., 406 N.J. Super. 13, 22-23 (App. Div. 2009) (A "party cannot simply disregard the final agency action, wait for the agency to bring an enforcement action under Rule 4:67-6 in a trial court, and then challenge the agency action in defense of the enforcement action.")

For the Court to grant the requested relief, the Department need only show that Defendant failed to comply with the FAO by failing to take the actions required by the FAO. As noted above, there is no pending or available administrative or appellate review of the FAO or the Department's findings therein that would preclude the Court from enforcing the FAO. See R. 4:67-6(c)(1).

The FAO unambiguously ordered Defendant to pay the civil administrative penalty in the amount of $5,500.00. There is no dispute that Defendant failed to ever pay this amount, and therefore, this Court should issue an Order enforcing the FAO in its entirety.

POINT II

THE COURT SHOULD ASSESS A CIVIL PENALTY AGAINST DEFENDANT FOR FAILING TO COMPLY WITH THE FAO.

The September 10, 2010 OAL Order became a Final Agency Order on or about January 24, 2011. As discussed above, the 2011 FAO requires Defendant to pay a penalty for its violations under the UST Act. However, Defendant has failed to comply with the FAO. A person violating the provisions of FAO issued pursuant to the UST Act is subject to the penalties prescribed in N.J.S.A. § 58:10A-10(e). N.J.S.A. 58:10A-32.

Pursuant to N.J.S.A. § 58:10A-10(e), the Court may impose a civil penalty of up to $50,000.00 per day for each day of such violation, and each day's continuance of the violation

shall constitute a separate violation. R. 4:70 provides for summary proceedings to recover statutory penalties. Such summary proceedings are to be brought in accordance with R. 4:67-6 unless the applicable statute requires a plenary action. R. 4:70-1(a).

As discussed above, Defendant has failed to comply with the FAO. Therefore, the Department requests the Court to assess an additional civil penalty against Defendant for its continuing failure to comply with the FAO, dating back to when the Order became Final in 2011.

CONCLUSION

For the foregoing reasons, DEP respectfully requests this Court enter an order granting the relief sought in the Verified Complaint, and such other relief as this Court deems appropriate.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey Department of
Environmental Protection

By: _____
Jesse J. Little
Deputy Attorney General

Dated: October 22, 2024

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street, PO Box 093 Trenton, New Jersey 08625-0093 Attorney for Plaintiffs

By: Jesse J. Little
Deputy Attorney General
Attorney ID: 412022022
Jesse.Little@law.njoag.gov
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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. RIVERS EDGE MALL, INC., JOHN/JANE DOES 1-10, and XYZ CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – MONMOUTH COUNTY DOCKET NO. MON-C- **CIVIL ACTION** **CERTIFICATION OF QUENTIN ZORN IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE**

I, Quentin Zorn, of full age, hereby certify as follows:

1. I am employed as an enforcement manager by the New Jersey Department of Environmental Protection (the "Department") within Contaminated Site Remediation & Redevelopment.

2. I am familiar with the contamination and enforcement history for 401 Liberty Street, also known as Block 379, Lot 1.01, on the tax maps of Long Branch City, Monmouth County, New Jersey (the "Site").

3. Since Defendant Rivers Edge Mall, Inc. purchased the property in 1969, the

property has primarily been utilized as a fuel dispensing station operated on the Site, including several underground storage tanks ("USTs").

4. In 1999, gasoline contamination was discovered in the soil surrounding the Underground Storage Tanks ("USTs") located on the Site.

5. Subsequent soil and groundwater testing in 2004 confirmed petroleum contamination in excess of the relevant soil and groundwater standards at the time.

6. Defendant's failure to adequately submit the requisite UST documents and submit a proper delineation and investigation of contamination on the Site resulted in the Department issuing an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") on May 16, 2006.

7. The May 16, 2006 AONOCAPA alleged Defendant was in violation of the UST Act, N.J.S.A. 58:10A-21 to -37, and the regulations promulgated thereunder, specifically N.J.A.C. 7:14B-8.2(a)(1), 7:26E-4.4(h)(3), 7:26E-4.1(b), and 7:14B-8.3(c). Defendant was assessed two $5,500.00 civil administrative penalties for its failure to complete a well search and receptor evaluation pursuant to N.J.A.C. 7:26E-4.4(h)(3) and its failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b).

8. On June 12, 2006, Defendant requested an adjudicatory hearing to contest the AONOCAPA; the hearing request was granted by the Department and the matter was transmitted to the Office of Administrative Law ("OAL").

9. On September 10, 2010, Administrative Law Judge Dennis P. Blake entered an Order finding Defendant failed to delineate the Site's soil and groundwater contamination in violation of N.J.A.C. 7:26E-4.1(b) and ordering Defendant to pay a $5,500.00 penalty for said violation. The September 10, 2010 OAL Order also required the Department to collect more evidence to determine whether the Department was entitled to an additional $5,500.00

penalty assessed against Defendant for the alleged failure to perform a surface water investigation under N.J.A.C. 7:26E-4.4(h)(3). Attached as Exhibit A is a true and correct copy of the September 10, 2010 OAL Order.

10. The Department ultimately withdrew the $5,500.00 penalty assessment for Defendant's alleged violation of N.J.A.C. 7:26E-4.4(h)(3) on December 10, 2010, thereby resolving the final contested matter before the OAL. Attached as Exhibit B is a true and correct copy of the Department's December 10, 2010 letter withdrawing the outstanding penalty assessment.

11. The Commissioner of the Department of Environmental Protection did not reject or modify the OAL Order within forty-five (45) days of the end of the contested case. Accordingly, the OAL Order became a Final Agency Order on or around January 24, 2011 pursuant to N.J.A.C. 1:1-18.6(e).

12. Defendant did not file any appeal of the Final Agency Order within forty-five (45) days in accordance with Rule 2:4-1(b).

13. To date, Defendant has failed to pay the $5,500.00 civil administrative penalty awarded to the Department for Defendant's violation of N.J.A.C. 7:26E-4.1(b).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Quentin Zorn

Dated: 10/21/2024

Exhibit A

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. ESR 6004-07
AGENCY DKT. NO. PEA060001-007186

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION-SITE REMEDIATION PROGRAM,
Petitioner,
v.
RIVERS EDGE MALL INCORPORATED,
Respondent.

Steve Barnett, Esq., for respondent (Connell Foley, attorneys)

Kimberly A. Hahn, Deputy Attorney General, for petitioner (Paul T. Dow, Attorney General of New Jersey, attorney)

Record Closed: July 26, 2010 Decided: September 10, 2010

BEFORE **DENNIS P. BLAKE**, ALJ:

Respondent, in this matter, appeals from an Administrative Order and Notice of Civil Penalty Assessment (AONOCAPA) issued on May 16, 2006. The AONOCAPA cited respondent for the following violations: failure to perform a remedial investigation in accordance with N.J.A.C. 7:26E-4; failure to conduct a receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)3; failure to delineate soil and groundwater

contamination pursuant to N.J.A.C. 7:26E-4.1(b); failure to submit a remedial action work plan in accordance with N.J.A.C. 7:14B-8.3(c). DEP also assessed a civil administrative penalty in the amount of $11,000.00 against respondent for these violations. Petitioner's appeal was filed on June 12, 2006. The matter was transmitted to the Office of Administrative Law (OAL) on July 12, 2007. A settlement conference was held on September 26, 2007. A prehearing order was entered on October 25, 2007. Thereafter, conferences were conducted on February 14, 2008, October 20, 2008, December 08, 2008, February 20, 2009, July 30, 2009 and September 3, 2009. The hearing in this matter was originally scheduled for June 08, 2010, however DEP filed a motion for summary decision on June 8, 2010, asserting that no genuine issues of material fact exist regarding respondent's liability for the penalty, and, therefore, as a matter of law, it is entitled to the civil penalties in the amount of $11,000 it assessed against respondent for allegedly violating the Tank Act, N.J.S.A. 58:10A-21 to -37, and the regulations promulgated thereunder. Respondent has not filed any opposition to this motion. My office left a voice mail with the attorney of record for respondent on June 30, 2010. Respondent's attorney did not return the message. Respondent's attorney was called again on July 8, 2010, and July 19, 2010, and voice messages could not be left because his voice mailbox was full. I decided to close the record seven days after that last phone call, that is, July 26, 2010. Hence DEP's motion for summary decision is unopposed.

FACTUAL AND LEGAL DISCUSSION

This matter involves an Underground Storage Tank ("UST") Facility once located at the intersection of Atlantic Avenue and Liberty Street, Long Branch, NJ, also known as Block 379, Lot 1.01 on the Tax Map of Long Branch, NJ ("the property"). (Nuss Cert. ¶¶ 4, 9-11, Ex. C, D, & E.) Glenn Reynolds, a State Investigator in Environmental Investigations employed with the New Jersey Department of Law and Public Safety, Division of Law, after conducting a deed search, discovered that respondent purchased the property in 1969 and is the current owner of the property. (Reynolds Cert. ¶¶ 3-4, Ex. A.) Respondent was incorporated in New Jersey in 1968, and its corporate status is currently pending reinstatement. (Reynolds Cert. ¶ 6, Ex. B.) S. Henry Shaheen

("Shaheen") is the registered agent for respondent and is listed as its president and secretary. (Reynolds Cert. ¶ 7, Ex. B.)

As early as December 11, 1994, Shaheen identified himself as the owner of the UST Facility located on the property and as the "highest ranking individual at the facility with overall responsibility." (Nuss Cert. ¶¶ 4, 9-11, Ex. C, D, & E.) Shaheen completed UST Facility Questionnaires for the property on December 11, 1994; October 24, 1997; and November 19, 1998. (Nuss Cert. ¶¶ 9-11, Ex. C, D, & E; Spera Cert. ¶ 7, Ex. A.) The UST facility consisted of three 8,000 gallon gasoline USTs, one 550 gallon waste oil UST, and one 1000 gallon heating oil UST. (Spera Cert. Ex. C, D, F; Nuss Cert. Ex. B.) A Gulf Service Station ("Gulf Station") was located on the property, and it ceased operations in September of 1999. (Spera Cert. Ex. C; Nuss Cert. Ex. B.)

On October 7, 1999, Paul Volkmer of Bell Environmental notified DEP that gasoline had been discharged from the UST Facility at the property into the soil. (Spera Cert. ¶ 8, Ex. B; Nuss Cert. ¶ 7, Ex. A.)[1] Thereafter, on October 27, 1999, Jeffrey Spera ("Spera"), a principal environmental specialist with the Site Remediation Program at DEP, conducted a UST facility inspection at the property. (Spera Cert. ¶¶ 1 & 9, Ex. C; Nuss Cert. ¶ 8, Ex. B.) During the inspection, Spera certifies that he observed free petroleum product in groundwater monitoring wells located on the property. (Spera Cert. ¶ 9.) However, this observation is not reported on the Inspection Checklist. (Spera Cert. Ex. C.)

According to a letter sent on August 8, 2000, to Shaheen, DEP issued a Field Notice of Violation on October 29, 1999, ("October 1999 NOV") requiring Shaheen to submit information and perform certain activities by November 27, 1999. (Spera Cert. Ex. D.) A copy of this notice has not been provided to further indicate what was observed at the site and what actions were requested.

[1] Although Spera certifies that Paul Volkmer notified DEP that the gasoline had been discharged into the groundwater, the exhibit does not support this. (Compare Spera Cert. ¶ 8 with Spera Cert. Ex. B.) Nuss certifies only that there had been a discharge of gasoline. (Nuss Cert. ¶ 7.)

DEP then sent a letter to Shaheen on August 8, 2000, regarding his failure to provide the information and perform the activities required by the October 1999 NOV and notified him that the Gulf Station was in violation of the Tank Act and Federal Regulations. (Spera Cert. ¶ 10, Ex. D.) DEP noted further violations. (Spera Cert. Ex. D.) It offered the Gulf Station the option to 1) complete a UST Certification Questionnaire if the USTs were permanently closed or upgraded, 2) take the USTs temporarily out of service, or 3) complete and submit an enclosed Administrative Consent Order if the USTs were permanently closed or upgraded within seven days to avoid the maximum penalty liability. (Ibid.) Shaheen did not respond. (Spera Cert. ¶ 10.)

Almost three years later, on July 24, 2003, DEP notified Shaheen that it had not received a response to the August 2000 letter. (Spera Cert. ¶ 11, Ex. E.) It requested a response within thirty days and stated that it could not consider "an extension until a complete Receptor Evaluation is submitted in accordance with N.J.A.C. 7:26E (see below)." (Spera Cert. Ex. E.) It provided the requirements for a Receptor Evaluation, stating that Shaheen "shall conduct a receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)3v. through ix. . . . within 30 days of the date of this letter." (Ibid.) It notified him that if he failed to do so, an enforcement action might result. (Ibid.) The evidence submitted does not indicate that ground water contamination had been confirmed at this point.

A little over a year later, on September 2, 2004, Focus Environmental, Inc. ("Focus") submitted to DEP a Remedial Investigation Report for the property. (Spera Cert. ¶ 12, Ex. F.) It was certified for respondent by Shaheen, as its president. (Spera Cert. Ex. F.) The report indicated that, beginning on April 27, 2004, the five tanks on the property had been removed, and all associated piping and dispenser pads were removed and investigated. (Ibid.) The post-excavation soil sampling in the area around the three 8,000 gallon gasoline tanks revealed the presence of various hazardous substances at concentrations exceeding the applicable New Jersey Soil Cleanup Criteria for benzene, ethylbenzene, xylenes, and chromium. (Id. at 10.) The report also indicated that "the ground water was found in the bottom of the excavation of the gasoline tank farm and impacted soils were in close proximity to the ground water.

Pursuant to the NJDEP technical guidance document a ground water investigation will be required in order to evaluate the subsurface conditions." (Id. at 11.) It does not appear from the report that a ground water analysis was performed, nor does it appear that ground water contamination was confirmed. (Spera Cert. Ex. F.)

On September 21, 2004, DEP, in a letter to Shaheen, summarized the latest site conditions at the property and the work that had been completed to date as provided by the report. (Spera Cert. ¶ 13, Ex. G.) Providing specific directions, it required that Shaheen "delineate the horizontal and vertical extent of contamination previously detected"; determine the level of hexavalent chromium in the soil through alkaline digestion; "submit documentation from the fill provider certifying that the material used as [partial] backfill was free of contaminants and met all requirements pursuant to N.J.A.C. 7:26E-6.4(b)"; conduct a ground water investigation in accordance with N.J.A.C. 7:26E-3.7 and/or 4.4 "[s]ince ground water was encountered within the excavation . . . and soil contamination was identified;" install and sample water monitoring wells, submitting results to DEP; perform a receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)(3)(i) through (ix) "[i]f ground water contamination is identified in excess of the Ground Water Quality Standards, N.J.A.C. 7:9-6"; conduct a well search . . . as part of the receptor evaluation; complete a baseline ecological evaluation for each contaminated site or area of concern in accordance with N.J.A.C. 7:26E-3.11; and submit a Remedial Action Selection Report that may be included as part of the remedial action work plan. (Spera Cert. Ex. G.) DEP notified Shaheen that if a well search was not conducted as required, DEP may initiate an enforcement action. (Ibid.) DEP required that Shaheen address the requirements and submit the results as part of a remedial action workplan within 90 days. (Id. at 6.)

On that same day, Focus notified DEP that a baseline ecological evaluation was performed, which included a general site inspection and documentation of existing site conditions. (Spera Cert. Ex. H.) It again notified DEP that groundwater was encountered during the excavation of the USTs, and it determined that there were "signs of ecological concern associated with the on-site contamination" because of the creek adjacent to the property and because of a nearby wetland. (Ibid.) It also notified DEP that "[a] well search has been ordered for the subject site and the results of the

well search will be forwarded to your office as soon as they are received and reviewed." (Spera Cert. ¶ 14, Ex. H.) Again, nothing suggested that ground water contamination was confirmed.

A year later, on September 14, 2005, DEP sent a letter to Shaheen informing him that it had yet to receive the remedial action workplan and, as such, he was considered out of compliance with the Tank Act and the Spill Compensation and Control Act. (Spera Cert. ¶ 15, Ex. I.) It directed him to comply with its September 21, 2004, letter, and advised him that it would seek penalties should he fail to comply. (Spera Cert. Ex. I.)

On October 27, 2005, DEP issued a NOV to respondent ("October 2005 NOV"), notifying it "that during a compliance evaluation conducted on October 7, 2005," DEP identified violations of, among other Acts, the Tank Act, for: failure to perform a remedial investigation in accordance with N.J.A.C. 7:26-4 and as outlined in DEP's July 24, 2003, and September 21, 2004, letters; failure to conduct a receptor evaluation, specifically a well search pursuant to N.J.A.C. 7:26E-4.4(h)(3)(v) and a surface water investigation pursuant to N.J.A.C. 7:26E-4.4(h)(3)(vii) and as outlined in DEP's July 24, 2003, and September 21, 2004, letters; failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b) and as outlined in DEP's September 21, 2004, letter; and failure to submit a remedial action workplan pursuant to N.J.A.C. 7:14B-8.3(c) and as required by DEP's September 21, 2004, and September 14, 2005, letters. (Spera Cert. ¶ 16, Ex. J.) The NOV stated that DEP would not assess a penalty if corrective actions were taken: a well search, pursuant to N.J.A.C. 7:26E-4.4(h)(3)(v), and surface water investigation, pursuant to N.J.A.C. 7:26E-4.4(h)(3)(vii), with submission of results to DEP within thirty days; delineation of the soil and groundwater contamination, pursuant to N.J.A.C. 7:26E-4.1(b), within sixty days; and submission of a remedial investigation report accompanied by a remedial action workplan within ninety days. (Spera Cert. Ex. J.) On December 1, 2005, DEP issued a second NOV to respondent ("December 2005 NOV"), reiterating the violations and the requested corrective actions listed in the October 2005 NOV. (Spera Cert. ¶ 17, Ex. K.)

On May 16, 2006, DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to respondent for violating, among other Acts, the Tank Act, N.J.S.A. 58:10A-21 to -37, and the regulations promulgated thereunder, specifically N.J.A.C. 7:14B-8.2(a)(1), -8.3(c), 7:26E-4.4(h)(3), and -4.1(b). (Spera Cert. ¶ 18, Ex. L; Nuss Cert. ¶ 12, Ex. F.) It specified that further compliance evaluations had been performed on October 7, 2005, and March 30, 2006, and that DEP had determined that respondent had failed to perform a remedial investigation, conduct a receptor evaluation, delineate soil and groundwater contamination, and submit a remedial action workplan. (Spera Cert. Ex. L; Nuss Cert. Ex. F.) It ordered respondent to submit an updated UST Registration Questionnaire within thirty days, perform a well search and a surface water investigation within sixty days, fully delineate the extent of soil and groundwater contamination within sixty days, and submit the results of the delineation of soil and groundwater contamination in a remedial investigation report accompanied by a remedial action workplan within sixty days. (Spera Cert. Ex. L; Nuss Cert. ¶ 13, Ex. F.) It further assessed a civil administrative penalty against respondent in the amount of $11,000 pursuant to the civil penalty schedule under former N.J.A.C. 7:26C et. seq. (Spera Cert. Ex. L; Nuss Cert. ¶ 14, Ex. F.) The penalty assessment worksheet attached explains that no penalties were assessed for respondent's failure to conduct a remedial investigation or submit a remedial action workplan; a penalty of $5,500 was assessed (7 days at $500 and 2 days at $1,000) for failure to complete a well search and receptor evaluation pursuant to N.J.A.C. 7:26E-4.4(h)(3); and a penalty of $5,500 was assessed (7 days at $500 and 2 days at $1,000) for respondent's failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b) . (Spera Cert. Ex. L; Nuss Cert. ¶¶ 19-20, Ex. F.)

On June 12, 2006, respondent requested an administrative hearing to contest the AONOCAPA. (Nuss Cert. ¶ 22, Ex. G.) Respondent asserted in the request that while it owned real property on the property it did not operate the USTs; that it had performed the remedial investigation and remedial work as reflected in a September 2, 2004, preliminary remedial investigation report; and that it had complied and intended to continue complying with the requirement to conduct a receptor evaluation, to delineate the contamination, to submit a remedial action workplan, and to perform a well search

and surface water investigation. (Nuss Cert. Ex. G.) Respondent further asserted that no penalty should be assessed because it did not operate the USTs. (Ibid.)

On November 15, 2007, Spera received an email from Roux Associates, Inc, ("Roux") an environmental consulting firm hired by Shaheen to work on the property. (Spera Cert. ¶ 19, Ex. M.) The email conveyed that a report had been submitted to DEP on September 26, 2007, that summarized "future planned activities [including] monitoring well installation, ground water sampling and completion of a receptor evaluation (which will include a well search and surface water and other required sampling)." (Ibid.) The email also revealed that these activities would likely not occur for another four or five months because of a needed permit. (Spera Cert. Ex. M.)

Over a year later, on February 3, 2009, Keystone E-Sciences Group, Inc, another firm retained by Shaheen to perform the investigation and remedial activities, submitted a schedule for remedial activities, including a receptor evaluation and well search. (Spera Cert. ¶ 20, Ex. N.) The schedule indicated that the monitoring wells had neither been installed nor sampled, a receptor evaluation and well search had not been completed, and a remedial investigation report had neither been prepared nor submitted. (Spera Cert. Ex. N.) The schedule planned to have all activities completed by October 15, 2009. (Ibid.)

Respondent submitted its Remedial Investigation Report and its Remedial Action Workplan on July 1, 2009. (Spera Cert. ¶ 21, Ex. O.) The report showed that Roux had performed a soil and groundwater investigation in March 2007 and that groundwater samples taken then confirmed that groundwater had been contaminated. (Spera Cert. Ex. O.) It also showed that in January of 2008, Roux had performed a surface water investigation. (Ibid.) It further showed that a receptor evaluation and well search had also been performed sometime in 2009. (Ibid.) Respondent has yet to pay the civil penalties assessed against it. (Spera Cert. ¶ 22; Nuss Cert. ¶ 23.)

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any

material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. An adverse party does not bear an obligation to oppose the motion, but to survive summary decision, there must be "a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The non-existence of one entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). I am required to do "the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." Id. at 539-40. Like the New Jersey Supreme Court's standard for summary judgment, the language for summary decision is designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Id. at 539 (citation omitted).

The Tank Act, N.J.S.A. 58:10A-21 to -37, grants authority to DEP to adopt rules and regulations "requiring the owner or operator of a facility to meet the standards for the construction, installation, and operation of new and existing underground storage tanks, including standards for secondary containment, monitoring systems, release detection systems, corrosion protection, spill prevention, and overfill prevention, and other underground storage tank equipment." N.J.S.A. 58:10A-29. Using that authority, DEP promulgated rules and regulations governing remediation activities for USTs, N.J.A.C. 7:14B-8.1 to -8.8, and governing remedial investigations for site remediation, N.J.A.C. 7:26E-4.1 to -4.9.

In the AONOCAPA, DEP determined that respondent violated the following Tank Act regulations: N.J.A.C. 7:14B-8.2(a)(1), -8.3(c), 7:26E-4.4(h)(3), and -4.1(b). It further assessed penalties against respondent specifically for violating N.J.A.C. 7:26E-4.4(h)(3) and N.J.A.C. 7:26E-4.1(b). DEP now asserts that as a matter of law it should be decided that respondent violated these provisions and is liable for the penalties assessed.

Violations of N.J.A.C. 7:14B-8.2(a)(1) and 7:26E-4.1(b).

N.J.A.C. 7:14B-8.2(a)(1) requires that "[t]he owner or operator of an underground storage tank system which has discharged hazardous substances . . . [p]erform a remedial investigation in accordance with the requirements of N.J.A.C. 7:26E-4." N.J.A.C. 7:26E-4.1 provides that "[a] remedial investigation is necessary at each area of concern with contaminants which exceed any applicable remediation standard." N.J.A.C. 7:26E-4.1(a). A remedial investigation requires, in relevant part, that the extent of contamination "in all media" be delineated, N.J.A.C. 7:26E-4.1(b); that a remedial investigation workplan be prepared, N.J.A.C. 7:26E-4.2; that the soil be investigated, N.J.A.C. 7:26E-4.3; that an investigation of groundwater be conducted if, among other reasons, "[a] soil sample collected from that area of concern within two feet of the saturated zone or bedrock contains a contaminant above the applicable soil remediation standard," N.J.A.C. 7:26E-4.4(a)(2); that further steps be taken if groundwater contamination is confirmed, N.J.A.C. 7:26E-4.4(h)(3); that surface water be investigated, N.J.A.C. 7:26E-4.5; that ecological receptors be further investigated if required under N.J.A.C. 7:26E-3.11(a)(4), N.J.A.C. 7:26E-4.7; and that a remedial investigation report be prepared, N.J.A.C. 7:26E-4.8.

By the time the AONOCOPA had been issued, respondent had failed for almost six and a half years to perform a remedial investigation "in accordance with the requirements of N.J.A.C. 7:26E-4." Many activities required in the performance of a remedial investigation went unperformed. Respondent failed to, for instance, investigate the surface water, pursuant to N.J.A.C. 7:26E-4.4(a)(2) and N.J.A.C. 7:26E-4.5. The undisputed facts support that the surface water investigation was not conducted until January of 2008. Moreover, the undisputed facts support that respondent had not delineated contamination in either the soil or groundwater on the site pursuant to N.J.A.C. 7:26E-4.1(b) by the time the AONOCOPA was issued. Consequently, as a matter of law, the allegations in the AONOCOPA asserting that respondent violated N.J.A.C. 7:14B-8.2(a)(1) and 7:26E-4.1(b) have been supported.

Violation of N.J.A.C. 7:14B-8.3(c).

In May of 2006, when the AONOCAPA was issued, N.J.A.C. 7:14B-8.3(c)[2] required that, in addition to the remedial investigation report prepared in accordance with N.J.A.C. 7:26C-4.1 to -4.7 by "the owner or operator of an underground storage tank system which has discharged hazardous substances" and submitted to the local health department and DEP, the owner or operator conducting a remediation shall submit

> 1. A request for a letter requiring no further action at the site if the remedial investigation indicates that no contamination at the site, or which has migrated off-site, exceeds any applicable remediation standard;
>
> 2. A proposed remedial investigation workplan prepared and presented pursuant to N.J.A.C. 7:26E-4.2 if the remedial investigation indicates that contamination remains in excess of any applicable remediation standard and the contamination on and off site has not been fully delineated vertically or horizontally; or
>
> 3. A proposed remedial action workplan, prepared and presented pursuant to N.J.A.C. 7:26E-6.2.
>
> [41 N.J.R. 4467(a) (December 7, 2009).]

The undisputed facts support that at the time the AONOCAPA was issued, respondent had not provided a remedial action workplan along with a remedial investigation report to the DEP in violation of former N.J.A.C. 7:14B-8.3(c). Hence, as a matter of law, the allegations in the AONOCOPA asserting that respondent violated N.J.A.C. 7:14B-8.3(c) have been supported.

Violation of N.J.A.C. 7:26E-4.4(h)(3)

As part of a remedial investigation conducted in accordance with the requirements of N.J.A.C. 7:26E-4, the owner or operator of an UST facility which has discharged hazardous substances must investigate the groundwater at the site if "[a]

[2] The current N.J.A.C. 7:14B-8.3(c) requires that the remedial investigation report, prepared in accordance with N.J.A.C. 7:26C-4.1 to -4.7 and submitted to the local health department and DEP, be "prepared either by an individual certified in subsurface evaluation pursuant to N.J.A.C. 7:14B-13 or by a licensed site remediation professional." N.J.A.C. 7:14B-8.3(c).

soil sample collected from that area of concern within two feet of the saturated zone or bedrock contains a contaminant above the applicable soil remediation standard." N.J.A.C. 7:26E-4.4(a)(2). If groundwater contamination is confirmed as a result of that investigation, then further steps must be taken, as required under N.J.A.C. 7:26E-4.4(h)(3):

> 3. If ground water contamination above the applicable remediation standards has been confirmed, the person responsible for conducting the remediation shall perform the requirements in (h)3i through ix below. . . .
>
> i. Delineate the vertical and horizontal extent of ground water contamination and the sources of ground water contamination . . . ;
>
> ii. Confirm the direction of ground water flow in each affected aquifer or water bearing zone, . . . ; and
>
> iii. Conduct aquifer tests, . . . ;
>
> iv. If a model to further define characteristics of the ground water flow system is used, documentation acceptable to the Department shall be provided in the remedial investigation report (N.J.A.C. 7:26E-4.8) indicating that the model was appropriate. . . . ;
>
> v. Perform an updated well search pursuant to N.J.A.C. 7:26E-1.17, based on the results of:
>
> (1) The delineation performed in (h)3i above; and
> (2) The confirmed groundwater flow direction determined in (h)3ii above;
>
> vi. Sample any existing potable and supply wells identified pursuant to the well search which are suspected to be contaminated by the site in question;
>
> vii. Evaluate any surface water body that may be impacted by the contaminated ground water . . . ;
>
> viii. Evaluate any subsurface utilities, basements or other structures to determine whether vapor hazards as a result of the ground water contamination may exist for receptors associated with the utility or structure. Measurement of oxygen levels, lower explosive limits

> (LEL) and the presence of organic vapors should be included in this evaluation; and
>
> ix. Evaluate the current and potential ground water uses using a 25-year planning horizon utilizing municipal and water purveyor planning data.
>
> [N.J.A.C. 7:26E-4.4(h) (emphasis added).][3]

As the undisputed facts establish, the contaminated soil was "within two feet of the saturated zone" as is supported by Focus' report that groundwater was at the bottom of the tank excavation area. Hence, respondent was required to perform a groundwater investigation. That investigation was not performed until March of 2007, as the Remedial Investigation Report indicates, and this was after the AONOCAPA was issued. Therefore, respondent failed to comply with N.J.A.C. 7:26E-4.4(a).

However, DEP did not assert in the AONOCAPA that respondent failed to comply with N.J.A.C. 7:26E-4.4(a); rather, it asserted that respondent was in violation of N.J.A.C. 7:26E-4.4(h)(3), specifically for failing to perform a receptor evaluation and well search. As emphasized in the provisions above, these activities must occur "if" groundwater contamination is confirmed. As the groundwater investigation was not conducted until March of 2007 and the factual evidence provided thus far infers that groundwater contamination had not been confirmed by any other method, respondent could not have violated N.J.A.C. 7:26E-4.4(h)(3) unless further evidence supports that contamination was confirmed. As of now, such evidence is lacking. Although Spera certifies that Paul Volkmer reported that the gasoline had been discharged into the groundwater, this is not evident on the report he submitted to DEP, nor is it evident from Spera's inspection report that Spera observed petroleum in the watering wells. Furthermore, as is evident in DEP's letter to Shaheen on September 21, 2004, the receptor evaluation requirement was conditioned upon a confirmation of contamination, indicating that the confirmation had yet to be made. It is unclear if and why DEP required that a receptor evaluation and well search be performed when groundwater contamination had not yet been confirmed. As it is possible that some evidence could

[3] N.J.A.C. 7:26E-4.4(h) has remained the same since the AONOCAPA was issued. 41 N.J.R. 4467(a) (December 7, 2009).

exist showing such confirmation, the issue of whether respondent violated N.J.A.C. 7:26E-4.4(h)(3) is not ripe for summary decision.

Assessment of and Liability for Civil Penalties

Considering respondent's violations minor, DEP assessed penalties against respondent in its AONOCAPA using the civil penalty schedule formerly under N.J.A.C. 7:26C-10.4(g), which stated:[4]

> (g) The Department shall assess a civil administrative penalty for all minor violations as follows:
>
> 1. The Department will provide the violator with written notice of each minor violation, including a description of the requirements that the violator has violated, the date that the violator was to have completed each task, the duration of the violation, and the amount of the penalty that is due and owing pursuant to this section.
>
> 2. The Department will also establish a period not to exceed 30 calendar days for the violator to correct the minor violation.
>
> 3. If the violator corrects a minor violation within the time frame the Department specifies in its notice described in (g)2 above, the Department will not assess a penalty for that violation.
>
> 4. If the violator fails to correct a minor violation within the time frame the Department specifies in its notice described in (g)2 above, the Department shall assess a civil administrative penalty in the following amounts:

Calendar Days After Due Date	Penalty
One to seven days	$ 500 per calendar day
Eight to 14 days	$ 1,000 per calendar day
15 days and over	$ 2,500 per calendar day

> [35 N.J.R. 2319(a) (May 19, 2003).]

[4] Special rules adopted on November 4, 2009, replaced subchapter 26C-10 with unrelated rules. 41 N.J.R. 4467(a) (December 7, 2009). The current applicable civil administrative penalty rules for violations of the Tank Act are found at N.J.A.C. 26C-9.5.

The facts support that DEP issued written notice to respondent of the alleged violations through the October 2005 NOV and the December 2005 NOV. The NOVs gave respondent thirty days to complete a well search, pursuant to N.J.A.C. 7:26E-4.4(h)(3)(v), and surface water investigation, pursuant to N.J.A.C. 7:26E-4.4(h)(3)(vii); sixty days to delineate the soil and groundwater contamination, pursuant to N.J.A.C. 7:26E-4.1(b); and ninety days to submit a remedial action workplan. Although DEP allotted more time for certain activities than former N.J.A.C. 7:26C-10.4(g) allowed, this certainly would not deprive it of the penalty: it merely extends the time frame in which respondent could have complied and shortens the time frame in which DEP can assess a penalty. In fact, although respondent failed to comply with both NOVs for over five months by the time DEP issued the AONOCAPA, DEP assessed civil penalties against respondent for the alleged violations for a period of only nine days, and did not assess any penalty for respondent's failure to conduct a remedial investigation or submit a remedial action work plan.

DEP first assessed a penalty of $5,500 (7 days at $500 and 2 days at $1,000) for respondents' alleged failure to conduct a well search and receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)(3). As it has been determined above that, based on the undisputed facts known at this time, issues of fact remain concerning whether respondent was required to act pursuant to N.J.A.C. 7:26E-4.4(h)(3) at the time the AONOCAPA was issued, it cannot be determined now that DEP is entitled to this penalty.

DEP also assessed a penalty of $5,500 (7 days at $500 and 2 days at $1,000) for respondent's failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b). As it has been determined above that, as a matter of law, respondent violated this provision, it can also be determined, as a matter of law, that DEP is entitled to this penalty.

CONCLUSIONS OF LAW

I **CONCLUDE** that petitioner's motion for Summary Decision seeking the imposition of a $5,500 fine for respondent's violation of N.J.A.C. 7:26E-4.1(b), should be

granted. I further **CONCLUDE** that petitioner's motion for Summary Decision seeking the imposition of a $5,500 fine for an alleged violation of N.J.A.C. 7:26E-4.4(h)(3) should be denied and that his matter should be continued to receive more evidence regarding whether respondent was required to comply with N.J.A.C. 7:26E-4.4(h)(3). If further evidence shows that groundwater contamination had been confirmed prior to the issuance of the October 2005 NOV or December 2005 NOV, and, therefore, that respondent violated N.J.A.C. 7:26E-4.4(h)(3), then DEP will be entitled to the remaining $5,500 it assessed against respondent for that violation.

ORDER

I hereby **ORDER** that Petitioner's motion for summary decision enforcing its Administrative Order and Notice of Civil Administrative Penalty Assessment, citing a violation of N.J.A.C. 7:14B-8.2(a)1, 8.3(c) and -4.1(b) and N.J.A.C. 7:26E-4.1(b) is **GRANTED**. Respondent is ordered to pay the civil penalty in the amount of $5,500. It is further ordered that petitioner's motion for a summary decision enforcing the AONOCAPA with respect to the alleged violation of N.J.A.C. 7:26E-4.4(h)(3) is **DENIED**.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

September 10, 2010

DATE

DENNIS P. BLAKE, ALJ

/mamf

Exhibit B

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Enforcement and Investigation
401 East State Street
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CHRIS CHRISTIE
Governor

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Lt. Governor

BOB MARTIN
Commissioner

DEC 10 2010

Via Regular Mail and Certified Mail
No. 7005 1160 0004 0964 1752

River's Edge Mall Incorporated
P.O. Box 282
West Long Branch, New Jersey 07764
Attention: Henry Shaheen

Re: New Jersey Department of Environmental Protection v. River's Edge Mall Incorporated, OAL Docket No.: ESR 06004-2007S, EA ID# PEA 060001-007186

Dear Mr. Shaheen,

On May 16, 2006, the New Jersey Department of Environmental Protection ("DEP" or "Department") issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("May 2006 AONOCAPA") to River's Edge Mall Incorporated ("River's Edge" or "Respondent") for violations of the Tank Act, and the regulations promulgated pursuant thereto. Specifically, the Department cited River's Edge for the following violations: failure to perform a remedial investigation in accordance with N.J.A.C. 7:26E-4; failure to conduct a receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)3; failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b); and, failure to submit a remedial action workplan in accordance with N.J.A.C. 7:14B-8.3(c).

In the May 2006 AONOCAPA, DEP assessed two penalties against River's Edge, one for failure to complete a well search and a receptor evaluation and one for failure to delineate soil and groundwater contamination. Each penalty was for $5,500, totaling $11,000.

River's Edge submitted a hearing request dated June 12, 2006. The Department granted this request on August 9, 2006, and the matter was transmitted to the Office of Administrative Law.

On June 3, 2010, DEP filed a motion for summary decision as to liability and the appropriateness of the assessed penalty as a matter of law. In an Initial Decision dated September 10, 2010, the Honorable Dennis P. Blake, Administrative Law Judge, granted DEP's motion for summary decision seeking the imposition of a $5,500 penalty for Respondent's

failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b). Judge Blake, however, denied the Department's motion for summary decision seeking the imposition of a $5,500 penalty for failure to conduct a well search and receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)3.

The Department hereby withdraws the $5,500 penalty it assessed against River's Edge for failure to conduct a well search and receptor evaluation in accordance with N.J.A.C. 7:26E-4.4(h)3. This resolves the sole outstanding issue before the Office of Administrative Law, as Respondent has come into compliance with the violations set forth in the May 2006 AONOCAPA. Please note that this determination does not impact DEP's entitlement to the $5,500 penalty for Respondent's failure to delineate soil and groundwater contamination pursuant to N.J.A.C. 7:26E-4.1(b), for which Judge Blake granted summary decision in the Department's favor.

Sincerely,

Ronald T. Corcory, Assistant Director
Enforcement and Assignment Element

C: Timothy Nuss, Compliance Manager
Jeff Spera, BSCM
Kevin F. Kratina, Chief, BSCM
Rachel Marshall, OAL
Kimberly A. Hahn, Deputy Attorney General
Janis E. Hoagland, DEP Office of Legal Affairs