DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Petitioner,
v.
KEARNEY INDUSTRIES,
Respondent.

Decided May 28, 1981

Initial Decision

SYNOPSIS

The Department of Environmental Protection sought to impose sanctions against Kearney Industries, Inc. for an alleged violation of the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., in that Kearney discharged waste water from a production building floor drain into a septic tank without having obtained the required permit. Kearney did not contest the determination that it discharged waste water containing phenol, a "hazardous pollutant" as defined by N.J.A.C. 7:14-8.3, without a permit. The company did contend, however, that the Department was without authority to compel the installation of monitoring wells and that the proposed penalty assessment of $3,125 was unjustified.

The administrative law judge observed that the Water Pollution Control Act provides for the regulation of discharges of pollutants, via a permit system, and also authorizes the Department Commissioner to eliminate violations of the act, or of regulations promulgated thereunder. Specifically, the judge noted that the Commissioner had the power under N.J.S.A. 58:10A-6 to require an individual obtaining a discharge permit to install monitoring equipment and submit monitoring reports to the Commissioner. Given the Commissioner's authority to require monitoring in instances where permits are sought and granted, the administrative law judge concluded that it would be anomalous to deny the Commissioner the same power in instances where no permit is sought but an unpermitted discharge is discovered.

The judge rejected Kearney's argument that despite the discharge of a pollutant, no useful purpose would be served by the installation of monitoring wells. Noting that where, as here, a company has discharged pollutants in such a way as to threaten the quality of the State's water, the judge concluded that it was not unreasonable for the Department to seek to compel the company responsible to determine whether the waters at the discharge site are polluted.
As to the proposed penalty, the administrative law judge noted that no evidence as to the reasonableness of the penalty had been presented to him. After reviewing the record and relying on N.J.A.C. 7:14-8.10(a)6, the judge concluded that a penalty of $1,725 was proper.

**Paul H. Schneider**, Deputy Attorney General for Petitioner (James R. Zazzali, Attorney General of New Jersey, Attorney)

**Michael V. Keawin**, Esq. for Respondent

**MASIN, ALJ:**

The Department of Environmental Protection (DEP), through the Division of Water Resources, seeks to impose sanctions against Kearney Industries, Inc. The company is alleged to have violated the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., by discharging waste water from a production building floor drain into a septic tank, without having obtained the necessary permit required by the act. Other discharges are also cited as violations and these will be mentioned below. The DEP seeks to impose a civil administrative penalty of $3,125, to require the company to install three groundwater monitoring wells at locations specified by the Department and to have samples of groundwater collected from these wells tested and analyzed for the presence of specified pollutants. An Administrative Order and Notice of Civil Administrative Penalty Assessment was issued on July 29, 1980. The respondent requested a hearing and the matter was then transferred to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq.

**THE UNCONTESTED FACTUAL CIRCUMSTANCES**

The DEP’s contention that the respondent discharged waste water containing phenol concentrations is essentially undisputed by the respondent. Phenol is a “hazardous pollutant,” as defined by N.J.A.C. 7:14-8.3. The evidence presented by both sides reveals that Kearney, in the course of its business, uses phenol to impregnate graphite heat exchangers. As part of the process, the company rinses the graphite materials with warm water. This procedure acts to remove unpolymerized resins from the exchangers. The rinsing is done over steel catch basins and the run-off, which goes onto the floor, is allowed to go into a floor drain. Originally, the waste water was drained out to a ditch which led to a tributary to Bound Brook. In January 1979, representatives of the United States Environmental Protection Agency (EPA) inspected the facility, and in April 1979, ordered
Kearney to terminate this unpermitted discharge. According to John G. Kearney's unrefuted testimony, the representatives of EPA advised, after being asked, that it would be all right for Kearney to discharge the waste water into an available septic tank "as long as it wasn't too long a period." Kearney proceeded to hook up the floor drain to the septic tank. On August 14, 1979, Charles Johnson, a Senior Environmental Engineer with the Division of Water Resources Enforcement Unit, inspected the Kearney property and viewed the discharge into the septic tank. While it is clear that he told the company's representative, Mr. Lejneks, that the company should obtain a permit for a permanent tie-in of the drain to the sanitary sewer line, the parties dispute whether or not he instructed Lejneks to cease the use of the septic tank and use a holding tank. This dispute will be considered below.

Following Johnson's August inspection, the company continued to use the septic tank, while applying for approval of the tie-in to the sanitary sewer. No one disputes the good faith effort of the company in pursuing the application, despite delays not of its own making. Eventually, in April 1980, the company received telephonic permission to hook up the drain to the sewer line, and placed an above ground connecting pipe to a manhole cover leading into the sewer. On April 16, 1980, Johnson returned to the site and saw the pipe, dislodged from its resting place, discharging onto the ground. This situation was immediately corrected. The final hookup into the sewer line occurred on April 28, 1980.

THE DISPUTED LEGAL ISSUES

The respondent does not contest the determination of the Department that the company did discharge waste water, containing phenol, without a permit. Its argument with the Department rests upon its contention that the Department is without statutory authority to compel the installation of monitoring wells. As an alternative to this position, Kearney contends that if there is statutory authority, the evidence in this case does not support the issuance of an order for the installation of such wells. Finally, the company contends that the penalty assessment of $3,125 is unjustified.

(a) THE AUTHORITY OF DEP TO ORDER INSTALLATION OF MONITORING WELLS

The DEP's authority with respect to discharge of pollutants is derived from the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. That legislation provides for the regulation of discharges of pollutants, via a permit system, and also authorizes actions by the
Commissioner of the Department to eliminate violations of the act, or of the regulations issued pursuant to the act. The statute permits the Commissioner to proceed administratively and/or through the courts. The relevant section is N.J.S.A. 58:10A-10, which reads:

a. Whenever, on the basis of any information available to him, the Commissioner finds that any person is in violation of any provision of this Act, or any rule, regulation, water quality standard, effluent limitation, or permit issued pursuant to this Act he shall:

(1) Issue an order requiring any such person to comply in accordance with subsection b of this section; or
(2) Bring a civil action in accordance with subsection c of this section; or
(3) Levy a civil administrative penalty in accordance with subsection d of this section; or
(4) Bring an action for a civil penalty in accordance with subsection e of this section; or
(5) Petition the Attorney General to bring a criminal action in accordance with subsection f of this section. Use of any of the remedies specified under this section shall not preclude use of any other remedy specified.

b. Whenever, on the basis of any information available to him, the Commissioner finds that any person is in violation of any provision of this act, or of any rule, regulation, water quality standard, effluent limitation or permit issued pursuant to this Act, he may issue an order

(1) Specifying the provision or provisions of this Act, or the rule, regulation, water quality standard, effluent limitation, or permit of which he is in violation,
(2) citing the action which caused such violation,
(3) requiring compliance with such provision or provisions, and
(4) giving notice to the person of his right to a hearing on the matters contained in the order.

c. The Commissioner is authorized to commence a civil action in Superior Court for appropriate relief from any violation of this Act or of a permit issued hereunder. Such relief may include, singly or in combination:

(1) A temporary or permanent injunction;
(2) Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing the case under this subsection;
(3) Assessment of the violator for any costs incurred by the state in removing, correcting or terminating the adverse
effects upon water quality resulting from any unauthorized discharge of pollutants for which the action under this subsection may have been brought;

(4) Assessment against the violator of compensatory damages for any loss . . . ;

In addition to the authority vested in the Commissioner to act pursuant to section 10, section 6 of the act, which provides for the issuance of discharge permits, allows the Commissioner, upon the grant of a permit, to require the permittee to "install, use and maintain such monitoring equipment and methods to sample, in accordance with such methods, to maintain and retain such records of information for monitoring activities, and to submit to the Commissioner such reports of monitoring results as he may require."

It is clear that had this respondent applied for and been granted a permit to discharge pollutants from its plant, the Commissioner, acting pursuant to section 6, would have had the power to require the installation of monitoring wells. Indeed, the language of subsection f is mandatory "a permit under this act shall require. . . ." While the exact nature of the monitoring requirement may be subject to the discretion of the Commissioner, the general requirement for monitoring is not.

Given the Commissioner's power under subsection 6 to require monitoring in situations where permits are sought and granted, we turn to section 10, where, as here, no permit is sought and an unpermitted discharge is discovered. What may the Commissioner do in order to assure compliance with and achievement of the goals of the legislation, as they are expressed in N.J.S.A. 58:10A-2, specifically the goals of abating pollution, restoring and enhancing the integrity of the state's waters and protecting the public health?

Given the goals expressed in section 2 of the act, and the legislative declaration in section 12 of the act that it be construed liberally, I have no doubt, and I CONCLUDE, that the legislation does permit the Commissioner to require, in a proper case, the installation and use of monitoring equipment by an unpermitted discharger, so as to permit the Department to assess the damage caused to the waters of the State, if any, and to enable the Department to determine the best methods of abating and restoring the waters to a safe and usable condition. The use of monitoring wells is merely a method for making such determinations and an order requiring their installation and use is surely a proper exercise of the Commissioner's authority, under section 10a. While the statute does not permit the Commissioner to assess costs against the pollutor, except through proceedings in Supe-
rior Court, subsection "c" of section 10 in no way directs that an
order for installation issue only through the judicial branch. *Hummel
Chemical Company*, OAL DKT. EWR 5849-79 (August 6, 1980),
22, 1981, A-440-80) (unreported). Indeed, it appears that subsection
"c" may be directed more at situations where the State is required to
place monitoring equipment on sites other than those owned by the
pollutor, and seeks to assess the costs against the transgressor. I see
nothing in the act which prevents the Commissioner from properly
ordering that a violator install monitoring equipment on its own
property.

(b) THE EVIDENTIAL BASIS FOR THE MONITORING WELL
REQUIREMENT

In opposing the Department's order on its merits, the respondent
has, through expert testimony, attempted to establish that, despite its
admitted discharge of waste water containing phenol into the septic
tank and onto the surface of the ground, no useful purpose will be
served by the placing of monitoring wells. In essence, the respondent
contends that given the amount of water, the percentage of free
phenol, the effects of bacteriological processes on the waste water and
the passage of time, the phenolic pollution of the soil and water, even
if it did occur, would have been extremely slight and, by now, long
since removed from the Kearney site. It is not hard to understand the
concern of this respondent, given the presence of nearby industries
and the potential for travel of polluted ground water through the
aquifer, that the monitoring of its own site may indeed reveal pollu-
tion - pollution caused not by its own limited discharge of its own
waste water, but instead, pollution attributable to processes occurring
somewhere else on someone else's property. In the respondent's view,
the use of these wells cannot serve to establish Kearney's responsibil-
ity for any existing ground water pollution under its site and, there-
fore, the order requiring it to install and monitor the wells cannot be
supported.

The respondent's argument misses the point of this proceeding. The
Department order does not seek to compel Kearney to clean up
polluted ground waters or assess the costs of such a clean-up against
the company. It merely seeks to have the admitted discharger of a
potentially hazardous substance monitor the condition of the ground
water under its property so that the Department can determine the
condition of that water. Attribution does not automatically spring
forth from the analysis of the tested waters. Responsibility for what
lies below must then be proven, in light of all known factors relevant
to the site, the surroundings, the pollutants found, the specifics of the analyses, etc. It may well be that, should phenolic pollution be found in the waters below Kearney, the Department will be unable to adequately establish, in a court of law or an administrative tribunal, the responsibility of Kearney for the existing pollution. However, the concern here is not yet ripe.

The court recognizes that there may be situations where the possibility of any pollution is so minute that even imposing a mere testing requirement would be arbitrary and unreasonable. However, I do not see this as being such a case. Here, a lengthy period of discharge occurred. Theoretical determinations of the respondent’s experts were made, perhaps understandably, without resort to any sampling of the soil or water. The picture they paint may indeed be correct, but, where a reasonable method exists for determining what is really in the water, reliance on theoretically based conclusions does not suffice.

The statute under which DEP acts is designed to provide the agency with wide ranging tools in order for it to carry out an extremely important mandate - one of extraordinary importance to the public. The Legislature has directed that the act be construed liberally so as to permit the agency to fulfill its role under the law. Where, as here, a company has discharged pollutants, in such a way as to give rise to a threat to the waters of the State, even if that threat be limited, it certainly is not unreasonable for DEP to seek to compel the company responsible for the discharge to determine whether the waters at the discharge site are polluted. The public benefit here clearly outweighs the company’s monetary loss. Further actions by DEP, aimed at attributing discovered pollution to the respondent, may lie ahead. If such actions should occur, the burden of establishing responsibility may be a heavy one. However, I CONCLUDE that the facts here warrant the imposition of an order requiring that the respondent install and monitor ground-water monitoring wells, in accordance with the directives of the Department.

(c) CIVIL ADMINISTRATIVE PENALTY ASSESSMENT

The DEP seeks to impose a civil administrative penalty in the amount of $3,125. Assessment of such penalties is governed by N.J.A.C. 7:14-8.10. The factors to be considered are type, seriousness and duration of the violation, as defined by the regulations.

The record before me does not include any evidence as to how the Division of Water Resources reached its decision to impose the $3,125 figure. While it may be presumed that some department employee calculated the penalty, pursuant to the formula contained in subsection (a)6, after concluding that the discharge fit within one of the four
seriousness categories and one of the four type categories, and assigning numerical value to each, pursuant to subsection (a)\(^5\), no evidence of such assessments and computations was placed in the record. As such, since some penalty does seem to be appropriate, I must attempt to assess it based upon an analysis of the evidence. While it is recognized that the Division’s assessment might, upon an analysis of the evidence in the record, be within some broad range of reasonableness, the lack of any evidence as to the method of calculation makes it impossible for me to make such a determination.

According to subsection (a)\(^3\), a willful violation is one which is the result of “some deliberate, knowing or purposeful action or inaction by the violator.” In the instant case, the discharge by Kearney of waste water, knowingly containing phenol, into the drainage ditch and the septic, was a deliberate action. Kearney did not do this by accident. In this sense, the deed was willful, as defined by the regulation. Such a definition does not appear to require a finding of fault.

To further assess the willfulness of Kearney’s violation, with specific regard to a knowing continuation of the discharge into the septic, it is necessary to consider the dispute between the testimony of Charles Johnson and Waldemars Lejneks over whether Johnson had advised Lejneks to cease discharging into the septic and use a holding tank. While both Mr. Lejneks and Mr. Kearney pointed out that a holding tank was available and claimed that they could have easily made use of it, if only they had been told by Johnson to stop using the septic, I am convinced that at some point during the time from Johnson’s inspection in August 1979 until the tie-in in late April 1980, Johnson must have done just that - told a representative of Kearney to stop placing polluted water in the septic. My review of the documentary evidence leads me to conclude that Johnson did orally advise Lejneks during his phone call of October 9, 1980. The circumstances at the time, especially Johnson’s receipt of the lab reports, which indicated phenolic pollution in the waste water, would seem to have naturally led Johnson to the type of discussion described by him in his testimony and noted by him in his report of the October 9 phone call. I cannot speculate on why Lejneks and/or Kearney would have ignored Johnson’s request, and a follow-up letter would certainly have been advisable. Nevertheless, I CONCLUDE that Johnson did tell Lejneks and, thereafter, Kearney’s continuing discharge into the septic, despite a warning to cease, constituted a willful violation, even under a definition of “willful” implying fault. With respect to the classification of the type of violation, I assign the value of 1.00, as directed by N.J.A.C. 7:148.10(a)\(^5\).
Since phenol is a hazardous pollutant, the regulation requires the addition of an additional factor of between 0.10 and 0.25. The added factor is to be determined by a consideration of the "inherent toxicity or harmful characteristics of the pollutant." The material in evidence from Water Quality Criteria notes that "the inspection of concentrated solutions of phenol will result in severe pain, renal irritation, shock and possibly death. A total dose of 1.5 grams may be fatal." Clearly, free phenol is very toxic. However, polymerized phenol is, as noted by Mr. Gilbert, used with complete safety in many items. The toxicity of partially polymerized phenolic resins must then vary, depending upon the percentage of free phenol in the mix. Here, the percentage of free phenol was not determined in any of the DEP tests. Whatever may have been present in the wash water, as it entered the septic, may have been reduced by the time the water exited into the lateral pipes.

Since the regulations speak of "inherent toxicity" and "harmful characteristics" and since free phenol clearly is toxic and harmful to a significant degree, I assess an additional .15 to the type value, giving consideration both to the toxicity and the limited percentage of free phenol which the manufacturer (Union Carbide) advises is contained in the resin.

With respect to the seriousness of the violation, I FIND no testimony from which I could conclude that the discharge here has caused any harm to humans or wildlife or property damage. Direct evidence of actual damage to natural resources, e.g., the aquifer, is also lacking, possibly in part due to the lack of any testing of the groundwater. As noted above, the discharge's toxicity is hard to measure, especially since the testimony reveals a lack of specificity in the testing procedure. However, phenol surely has a highly toxic potential, if the free phenol should be exposed to the environment.

The duration of the discharge into the septic itself lasted from at least shortly after the EPA issued its "Cease and Desist" Order on April 2, 1979 until the phone approval of the sewer tie-in on March 25, 1980, and also included the spill from the aboveground pipe, noted by Johnson on April 16, and the indications of spills from the outdoor catch basin, noted during that visit. The exact duration of these latter discharges is uncertain. On the whole, the duration of discharge was lengthy, nearly one year into the septic itself.

Subsection (a)1 establishes four classes of seriousness. They are each based on an assessment of actual or potential harm - "harm caused or likely to be caused." In this case, the evidence does not permit a finding of any actual harm caused to the public health,
safety, welfare or to the environment. The potential damage to these, if free phenol or partially unpolymerized phenol entered the aquifer, would, of course, be dependent upon the amount actually entering the groundwater, the duration of its stay as less than wholly polymerized phenol and the chance occurrence of its up-take, in a toxic state, into wells or entry into streams. Assessment of the damage potential is difficult. I CONCLUDE that the violation here cannot be deemed only technical in nature and, thus, insignificant, at least partly due to its duration. A rating in the realm of slight damage seems most reasonable. I assess the value at $.30.

Applying the values arrived at above to the formula contained in N.J.A.C. 7:14-8.10(a)6, I compute the basic penalty at $1,725.

The Department argues that the requested $3,125 penalty is reasonable, partly because a penalty of that nature "would be justified for just one of the several violations involved in this case." The Department feels that "a penalty far in excess of $3,125 might properly have been assessed." Perhaps such is the case. However, the Division apparently sought to impose only one penalty. The reasonableness of that assessment must be based on the evidence. No analysis of that evidence, with penalty computations in mind, has been presented to me. As such, I am left to my own review of the record. I believe the assessment noted above is reasonable, without being either overly lenient or too harsh. The assessment does attempt to balance both the willfulness and duration against the present inability to make any reasonable judgments as to how, if at all, the discharge has actually affected the environment.

CONCLUSION

In summary, I CONCLUDE that the Commissioner of the Department of Environmental Protection is authorized, in the proper case, to order a violator of the Water Pollution Control Act to install monitoring wells and sample and analyze the same, so as to permit an evaluation of the condition of the groundwater on the site of the unpermitted discharge. Further, I CONCLUDE, on the basis of the evidence before me, that the imposition of such a requirement in the present case is justified. Finally, I CONCLUDE that the assessment of a civil administrative penalty of $1,725 is appropriate, in light of the evidence and the standards established in N.J.A.C. 7:14-8.1, specifically section 8.4.

It is ORDERED that the respondent install a minimum of three groundwater monitoring wells, in accordance with locations and specifications determined by the New Jersey Department of Environmental Protection. It is further ORDERED that, in accordance with such
specifications, the respondent collect groundwater samples from said wells in accordance with the procedures of the Division of Water Resources and have said samples analyzed by a certified laboratory for the presence of pollutants specified by the Division in its Administrative Order and submit the results of said analyses to the Department of Environmental Protection. It is further ORDERED that the respondent shall provide the Department with access to said wells for sampling and shall further provide the Department with adequate notice to allow it to collect duplicate samples at all times that the respondent samples said wells.

It is further ORDERED that the respondent shall pay a Civil Administrative Penalty of $1,725, payment of said assessment to be made, in full, within 15 days of the date of the entry of a final order in this proceeding.

After reviewing this Initial Decision, the Commissioner of the Department of Environmental Protection on July 13, 1981 issued the following Final Decision:

Upon receipt of the Initial Decision, the parties submitted exceptions dealing with three issues:

1) The requirement of an unspecified number of monitoring wells being installed;

2) The propriety of the administrative law judge's review of the amount of the administrative penalty levied by the Division of Water Resources; and

3) The assessment of any administrative penalty against Kearney Industries.

I have concluded that the monitoring wells requirement in the Administrative Order issued July 29, 1980 and upheld in the initial decision is proper. The purpose of the monitoring wells is to take samples for specified pollutants to determine the quality of ground water at the site. It is impossible to render a decision as to the number of wells required for this purpose at this time. At this time, I conclude that no limitation on the number of monitoring wells in this case is proper nor required.

As to the assessment of the civil administrative penalty the record is clear that an assessment was proper. No burden is imposed upon the Division of Water Resources under the statute excepting that the penalty notice contain a statement of the civil penalty to be imposed, a statement of the facts of the alleged violation and that the amount fall within a range established by
the Department of violations of similar type, seriousness and duration. These requirements were met in this matter, and a civil administrative penalty is therefore appropriate in this matter.

The Division of Water Resources, however, takes exception to the discretion of the administrative law judge in revising the penalty amount. While the Division is not burdened with presenting the particular formula upon which the penalty is assessed, failure to do so can subject the Division to the type of analysis undertaken by the administrative law judge in this matter. Given this fact, I find the conclusion of the administrative law judge in assessing the penalty at $1,725.00 to be reasonable and I affirm that conclusion in this Final Decision.

The exceptions filed by the Division of Water Resources notes that a greater penalty could have been assessed inasmuch as "at least three discharges were established." My decision can only be based upon the actual assessment made in a matter, and the issue as to whether a "penalty for in excess of $3,125.00 might have been assessed" is not before me.

I therefore adopt the initial decision as the Final Decision in this matter. Kearney Industries is Ordered to comply with the requirements of the initial decision within the time frames set forth therein.