State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

BOB MARTIN
*Commissioner*

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| NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,<br><br>Petitioner,<br><br>v.<br><br>STRATEGIC ENVIRONMENTAL PARTNERS, LLC, RICHARD BERNARDI, INDIVIDUALLY, and MARILYN BERNARDI, INDIVIDUALLY,<br><br>Respondents. | ADMINISTRATIVE ACTION<br>FINAL DECISION<br>CONSOLIDATED<br><br>OAL DKT. NOS. ECE 05826-13, ECE 05827-13, ECE 05829-13, ECE 05833-13, ECE 05834-13, ECE 05835-13, ECE 08169-13, ECE 08170-13, ECE 09037-13, ECE 11115-13, and ECE 12451-13<br><br>AGENCY REF. NOS. PEA 130008-26889, 130007-28889, 130006-26889, 130005-26889, 130004-26889, 130003-26889, 130002-26889, 120005-26889, 120003-26889, 120002-26889, and 130005-132518[1] |

This matter concerns a challenge by Strategic Environmental Partners, LLC (SEP), Richard Bernardi, and Marilyn Bernardi (collectively, Respondents) to 11 Administrative Orders and Notices of Civil Administrative Penalty Assessment (AONOCAPAs) issued by the Department of Environmental Protection (Department) for solid waste management and air pollution violations at the Fenimore Landfill on Mountain Road, Roxbury Township, Morris County (Block 7404, Lot 1). The Department issued 10 AONOCAPAs between December 2012 and July 2013 pursuant to the

[1] The list of agency reference numbers is corrected to include PEA 130005-132518, which was omitted in the caption of the Initial Decision.

Air Pollution Control Act (APCA), N.J.S.A. 26:2C-1, et seq., and the regulations promulgated pursuant thereto, and one AONOCAPA in March 2013 pursuant to the Solid Waste Management Act (SWMA), N.J.S.A. 13:1E-1, et seq, and the regulations promulgated pursuant thereto.[2]

The SWMA AONOCAPA cited Respondents for failure to control dust, for failure to control hydrogen sulfide odors, and for failure to grant the Department access to the Fenimore Landfill and the records stored there, and assessed civil administrative penalties totaling $99,000. The APCA AONOCAPAs cited Respondents for numerous hydrogen sulfide odor emission violations based on verified complaints, and assessed total civil administrative penalties of $775,000. Respondents requested a hearing to contest each of the AONOCAPAs. The Department granted the hearing requests and transmitted them to the Office of Administrative Law (OAL), where they were consolidated and assigned to Administrative Law Judge (ALJ) Michael Antoniewicz.

The ALJ conducted hearings on March 13, 23, and 30, 2015. On September 14 and 15, 2015, the parties submitted post-hearing briefs, and the Department filed a reply brief on September 24, 2015. On November 12, 2015, the ALJ issued an Initial Decision affirming the AONOCAPAs and the penalties assessed therein. The ALJ determined that Richard and Marilyn Bernardi are jointly and severally liable for each of the AONOCAPAs under the responsible corporate officer doctrine and the doctrine of piercing the corporate veil. On November 20, 2015, the ALJ issued an Amended Initial Decision that corrected errors not relevant to the substance of the Initial Decision. Neither Respondents nor the Department filed exceptions.

[2] In nine of the 11 AONOCAPAs, the Department cited SEP and Richard Bernardi as responsible parties, and in two AONOCAPAs, the Department cited SEP, Richard Bernardi, and Marilyn Bernardi. During the proceedings at the Office of the Administrative Law, the Department moved to amend the nine AONOCAPAs to add Marilyn Bernardi as a responsible party. Respondents opposed the motion, arguing that the Department's motion to amend was untimely and would be unduly prejudicial to Marilyn Bernardi. The Department responded, asserting that the motion to amend was late as a result of Respondent's failure to timely answer discovery requests and that there would be no prejudice because Marilyn Bernardi was involved throughout the OAL proceedings, was represented by the same counsel as Richard Bernardi and SEP, and was already defending herself against the same allegations underlying the AONOCAPAs that did cite her specifically. The ALJ granted the motion.

Based upon my review of the record, I concur with the ALJ's determination that the violations cited by the Department in the AONOCAPAs did occur. I also concur with the ALJ's finding of liability under the AONOCAPAs against SEP, Richard Bernardi, individually, and Marilyn Bernardi, individually, with the modifications discussed below. I therefore ADOPT the ALJ's Amended Initial Decision as MODIFIED in this Final Decision.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

SEP's sole member and officer is Marilyn Bernardi. Marilyn Bernardi identified herself as the President of SEP in several legal documents, signed over 100 checks on the corporate bank account, and used SEP's bank account to make a $275,000 contribution to her own pension plan in September 2013. In or around January 2011, Marilyn Bernardi, in her capacity as the sole officer of SEP, authorized Richard Bernardi, her spouse, to act on SEP's behalf at all times despite the fact that he was not an officer or employee of SEP or affiliated with SEP in any way. Later in 2011, SEP purchased the Fenimore Landfill for purposes of developing it into a solar farm. In that regard, Richard Bernardi executed a $950,000 mortgage agreement identifying himself as the "Managing Member" of SEP. Marilyn Bernardi personally guaranteed the mortgage and approved Richard Bernardi's actions.

After the purchase, SEP, through Richard Bernardi identifying himself as the "Director" of SEP, submitted to the Department a landfill closure plan (the Closure Plan) that is expressly governed by the SWMA and its implementing regulations. The Closure Plan also cites to and imposes requirements under the Department's odor control regulation, N.J.A.C. 7:27-5.2(a), which was promulgated pursuant to the APCA. SEP, through Richard Bernardi, simultaneously submitted a financial plan to the Department.

In October 2011, the Department approved the Closure Plan. It thereafter executed an Administrative Consent Order (ACO) with SEP, which was signed by Richard Bernardi individually and as the "Director and Managing Member" of SEP.[3] Among other things, the ACO stipulated that Richard Bernardi was individually liable for the first phase of the Closure Plan[4] and that SEP was required to establish an escrow account funded by tipping fees that would be received by SEP when it accepted fill material onto the landfill. The tipping fees were intended to act as financial assurance so that sufficient monies would be available for the proper operation and closure of the landfill. In furtherance of that requirement, Marilyn Bernardi opened an escrow account with Wells Fargo Bank, N.A. identifying herself as the "President" of SEP. Neither SEP nor the Bernardis, however, deposited any tipping fees into the escrow account during their operation of the Fenimore Landfill. Marilyn Bernardi and Richard Bernardi knew of SEP's failure to deposit the tipping fees they received from accepting fill at the Fenimore Landfill, and together they agreed not to make those deposits.

On May 20, 2012, while the Closure Plan was in effect, SEP filed suit against the Department in the Superior Court of New Jersey. The Verified Complaint identified Richard Bernardi as "President" of SEP, and he subsequently submitted 10 Certifications to the Court stating that he was the "Manager" of SEP.

[3] The Department incorporated the Closure Plan into the ACO. The ACO was entered into with SEP based on the Department's analyses of the Fenimore Landfill and any potential environmental risks that may be associated with the activities SEP proposed there, as well as the Department's review of SEP's financial information. During the course of the OAL proceedings, however, it was revealed that SEP, through Richard Bernardi, did not disclose all of SEP's debts and liabilities in the financial plan. Marilyn Bernardi knew that the financial plan did not include that information when it was submitted to the Department, but did nothing to correct it.

[4] The first phase of the Closure Plan involved the use of 360,000 cubic yards of fill to cover 18.1 acres of the Fenimore Landfill. Respondents did not move beyond that phase of the Closure Plan.

SWMA Violations

Pursuant to Marilyn Bernardi's approval, Richard Bernardi was in charge of the day-to-day operations at the Fenimore Landfill between December 2011 and June 2013. In June, July, and November 2012, while operations were ongoing, the Department inspected the Fenimore Landfill several times each month for compliance with the SWMA, the ACO, and the Closure Plan. On numerous occasions, the Department's employees observed trucks entering and exiting the landfill that were generating large amounts of dust that migrated off the Fenimore Landfill and onto neighboring properties. SEP had not implemented any measures to control the dust despite being required to do so by the SWMA, the ACO, and the Closure Plan. Richard Bernardi was specifically advised by the Department's inspectors that the dust must be controlled, but dust continued to migrate off the Fenimore Landfill. During an inspection in November 2012, Richard Bernardi indicated that he used a water truck to control the dust but that it was not on-site because it was being "winterized." The Department's inspectors again informed Richard Bernardi that he and SEP were required to control dust. Mr. Bernardi's response was: "So write me up."

During a November 2012 site visit, the Department's inspectors specifically noted a rotten egg odor, which is typically associated with hydrogen sulfide gas, near the on-site office trailer. This prompted a Department inspector to ask Richard Bernardi whether cover materials were being brought onto the Fenimore Landfill to control such odors as required by the ACO and the Closure Plan. Mr. Bernardi responded that he used soil as a cover material. Contrary to that statement, however, the Department inspectors did not note any attempts by Richard Bernardi or SEP to use soil to abate the hydrogen sulfide odors during the site visit.

In December 2012, the Department conducted additional inspections of the Fenimore Landfill. During one inspection, a Department employee requested that Richard Bernardi produce

documentation that approved the materials being brought on-site, i.e., the Closure Plan. Rather than comply with the request, and despite being reminded by the Department's inspectors that the ACO and Closure Plan required Respondents to maintain records at the Fenimore Landfill, Richard Bernardi instructed the Department employee to leave the property. Consequently, the Department employee was unable to complete his inspection of the site and records. During a follow-up inspection that month, Department inspectors again requested documentation from Richard Bernardi, and again, rather than comply with the request, Richard Bernardi instructed the Department inspectors to leave the Fenimore Landfill and threatened to call the police.

Throughout November and December 2012 and into January and February 2013, the Department continued to inspect the Fenimore Landfill. During that span, the inspectors confirmed that, from at least late 2011 through early 2013, SEP had been accepting construction and demolition fines at the Fenimore Landfill in order to construct a cap.[5] In November 2012, a Department inspector observed numerous inbound trucks loaded with construction and demolition fines, as well as a mound of construction and demolition fines already on-site that was not covered by clean soil. The Department inspector did not observe any clean soil at the Fenimore Landfill that might be used to cover the construction and demolition fines. A Department employee made similar observations in February 2013 and also observed an intense rotten egg odor. The Department inspector noted that a majority of the Fenimore Landfill, including the side slopes, was exposed. The Department inspector asked Richard Bernardi whether clean soil was being used for daily cover. Mr. Bernardi responded that he would arrange for a delivery of soil when a "job" became available. He did not, however, give any indication that he would arrange for soil cover to be used daily as required by the ACO and the Closure Plan.

[5] Construction and demolition fines are a powdery mixture, typically grey in color, generated by demolishing a home or building.

The Department issued several Notices of Violation to Respondents for the previously discussed violations of the SWMA, the ACO and the Closure Plan. In March 2013, the Department issued the SWMA AONOCAPA to Respondents, specifically citing Respondents' failure to control dust at the Fenimore Landfill, their failure to control hydrogen sulfide odors, and their failure to provide Department inspectors with access to the site and records. The SWMA AONOCAPA imposed civil administrative penalties totaling $99,000.

APCA Violations

The Department first became aware of complaints of hydrogen sulfide odors emanating from the Fenimore Landfill in or around late October 2012. Between October 2012 and June 2013, the Department received approximately 2,500 odor complaints relating to the Fenimore Landfill. Of those, 167 were verified by the Department's inspectors. During the inspections, Department employees confirmed, through the use of their senses, the rotten egg odor that is typically associated with hydrogen sulfide, and they consistently traced that odor to the Fenimore Landfill. Because of the odors, the citizens of Roxbury Township experienced, among other things, physical effects ranging from headaches to vomiting. In several instances, children and other guests could not remain on property owned by Roxbury citizens because of the odors.

The ACO, the Closure Plan, and the APCA required SEP to control malodorous emissions from the Fenimore Landfill. As early as mid-November 2012, Respondents were on notice that the Fenimore Landfill was suspected of emitting hydrogen sulfide odors. On November 21 and 30, 2012, Department inspectors investigated the Fenimore Landfill and concluded that Respondents had failed to comply with the odor control requirements of the ACO, the Closure Plan and the APCA, specifically N.J.A.C. 7:27-5.2(a). As a result, the Department issued a Notice of Violation to SEP

and Richard Bernardi on December 3, 2012. However, neither SEP nor the Bernardis took any steps to address the emissions. Consequently, between December 2012 and July 2013 the Department issued 10 APCA AONOCAPAs to Respondents, imposing a total of $775,000 in civil administrative penalties.

## OAL PROCEEDINGS AND THE ALJ'S INITIAL DECISION

During the OAL proceedings, the Department presented documentary evidence and the uncontested testimony of 11 witnesses, including citizens of Roxbury Township and employees of the Department. Respondents did not present any witness testimony or documentary evidence to dispute the above-described facts that support the AONOCAPAs. Respondents also did not challenge the individual liability of Richard Bernardi or Marilyn Bernardi. Instead, Respondents challenged the constitutionality of the APCA and argued that the SWMA violations were part of a comprehensive plan by the Department to harass Respondents.

In the Amended Initial Decision, the ALJ upheld all 11 AONOCAPAs in their entirety and the civil administrative penalties assessed therein. The ALJ found that the Respondents had violated the SWMA, the APCA, the ACO and the Closure Plan, and that each civil administrative penalty was assessed properly in accordance with the applicable regulations.[6] The ALJ rejected Respondents' arguments as to the constitutionality of the APCA and the Department's alleged plan to harass Respondents. Pursuant to the responsible corporate officer doctrine and the doctrine of piercing the corporate veil, the ALJ upheld individual liability against Richard Bernardi and Marilyn Bernardi for their respective conduct in allowing the violations to occur and persist. The ALJ

[6] During the OAL hearings, Respondents stipulated that the penalties assessed in the eighth, ninth and tenth APCA AONOCAPAs were assessed properly.

ordered SEP, Richard Bernardi, and Marilyn Bernardi to pay the $99,000 in penalties assessed in the SWMA AONOCAPA and the $775,000 in penalties assessed in the APCA AONOCAPAs.

## DISCUSSION

### SWMA AONOCAPA

The SWMA authorizes the Department to, among other things, regulate and supervise all solid waste collection and disposal facilities in New Jersey and to register all persons engaged in the collection or disposal of solid waste. N.J.S.A. 13:1E-2. The SWMA is a strict liability statute such that, in order to impose a penalty the Department need only prove, by a preponderance of the credible evidence, that the proscribed act was committed. See Dep't of Environmental Protection v. Harris, 214 N.J. Super. 140, 147-48 (App. Div. 1986). The Department's regulations implementing the SWMA "govern the registration, operation, maintenance, and closure of sanitary landfills and other solid waste facilities . . . and the assessment of civil administrative penalties." N.J.A.C. 7:26-1.1(a). N.J.A.C. 7:26-2A.8 sets forth the sanitary landfill operation and maintenance requirements. Among other requirements, all sanitary landfills must, as needed, control dust by spraying water or by spreading calcium chloride or an equivalent thereto. N.J.A.C. 7:26-2A.8(b)29.

The Department confirmed violations of the dust control requirements at the Fenimore Landfill during inspections in June, July, and November 2012. During the inspections, Department employees noted that SEP and Richard Bernardi did not control dust generated by trucks entering and exiting the landfill by spraying water, calcium chloride, or a Department-approved equivalent. Department employees observed, on numerous occasions, the dust generated by the trucks migrating from the Fenimore Landfill onto adjacent properties. As a result, the Department issued SEP and Richard Bernardi Notices of Violation on July 10, 2012, and November 26, 2012.

The SWMA regulations require that Department inspectors be granted access to solid waste facilities in order to, at any time, enter and inspect any building or portion of a facility. N.J.A.C. 7:26-2.11(d). Under the regulation, the Department has the ability to take samples and photographs, investigate any possible sources of pollution, ascertain compliance with all statutes, rules, regulations, and/or conditions contained within solid waste facility permits, and review all applicable documents and records, which must be furnished to the Department upon request. Department employees were twice denied access to the Fenimore Landfill and to all documents and records that were required to be stored there – once on December 11, 2012, and once on December 17, 2012. For these violations, the Department issued Notices of Violation to SEP and Richard Bernardi on February 8, 2013 and February 16, 2013.

All persons engaged in the disposal of solid waste at a facility must also comply with any and all conditions, limitations, or discharge requirements that may be specified in a solid waste facility permit issued by the Department and in the operational and maintenance requirements of N.J.A.C. 7:26-2A and N.J.A.C. 7:26-2. N.J.A.C. 7:26-2A.4(l). The Closure Plan, which acted as a permit, and the ACO stipulated that Respondents' closure activities must not cause any air contaminants to be emitted in violation of N.J.A.C. 7:27-5.2(a). Respondents were required to control any such emissions through the use of daily soil cover. In the event the daily cover was not controlling emissions satisfactorily, Respondents were required to apply a Department-approved deodorant. The Department confirmed violations of the Closure Plan's and ACO's requirement to control odor emissions during inspections of the Fenimore Landfill in November 2012 and in January and February 2013. During those inspections, Department employees detected and recorded odors manifesting the rotten egg quality indicative of hydrogen sulfide. Department employees further observed that the areas of the Fenimore Landfill from which the odors were emanating were not

covered with soil and that Respondents had not established stockpiles of soil or material that could be used as daily cover. For these violations, the Department issued SEP and Richard Bernardi Notices of Violation on December 5, 2012, February 22, 2013, and March 15, 2013.

During the OAL proceedings, Respondents challenged the Department's conduct in issuing the SWMA AONOCAPA by arguing that the inspections leading to the discovery of the violations previously discussed were the product of an agency-wide plan to harass Respondents. As properly concluded by the ALJ, however, nothing in the record supports this allegation; no evidence of a goal or pattern of harassment was presented. The inspections by the Department were performed properly and in accordance with the governing provisions of the Closure Plan, the ACO, the SWMA and N.J.A.C. 7:26-2.11(d). This argument is without merit.

*Penalty calculations*

On March 20, 2013, the Department issued the SWMA AONOCAPA to SEP and Richard Bernardi, citing violations of all the above-referenced regulations, and of the Closure Plan and the ACO. The Department noted the violations of N.J.A.C. 7:26-2A.8(b)29 in June and July 2012 for failure to control dust that corresponded to the July 10, 2012, Notice of Violation. Dust violations are designated "minor" by N.J.A.C. 7:26-5.4(g)3, and thus a "grace period" of one day is applicable under N.J.A.C. 7:26-5.10(a). A "grace period" is a period of time afforded to a violator to correct their first violation and avoid a penalty. Though it is not reflected in the record, it is presumed that SEP and Richard Bernardi did correct their first dust control violations in June and July 2012 because the Department declined to assess a penalty. The Department also noted, however, the dust control violations in November 2012 that corresponded to the November 26, 2012 Notice of Violation. Because the November violations constituted repeat offenses within a period of less than

12 months, the violations were not minor and a grace period was not applicable. Accordingly, a base penalty in the amount of $3,000 was assessed in accordance with N.J.A.C. 7:26-5.4(g)3. Although three separate November dust control violations were cited by the Department (one of which was later withdrawn during the hearings), the Department exercised its discretion and assessed a penalty for only one violation.

The Department cited the December 2012 violations of N.J.A.C. 7:26-2.11(d) for failure to provide access that corresponded to the February 8, 2013, and February 16, 2013, Notices of Violation. For the violation cited in the February 8, 2013, Notice of Violation, the Department assessed a penalty of $4,000, at the midpoint of the applicable penalty range in accordance with N.J.A.C. 7:26G-2.7(c)2, and increased the penalty by 50%, as permitted by the penalty rule, because SEP and Richard Bernardi had violated a different rule within the past 12 months (the dust control violation). The total penalty assessed was thus $6,000. As to the violation cited in the February 16, 2013, Notice of Violation, the Department assessed the mid-point penalty of $4,000, and increased the penalty first by 100% because Respondents had violated the same rule (N.J.A.C. 7:26-2.11(d)) within the past 12 months, and then added a 50% increase because Respondents had violated a different rule in the past 12 months (the dust control violation). The total penalty was thus $10,000.

Last, the Department cited the violations of the Closure Plan and N.J.A.C. 7:26-2A.4(l) for failure to control odors from November 2012 and January and February 2013. Because violations of N.J.A.C. 7:26-2A.4(l) are not covered by the penalty provisions in N.J.A.C. 7:26-5.4, the Department applied N.J.A.C. 7:26-5.5 . For the November 2012 violations that corresponded to the December 5, 2012, Notice of Violation, the Department assigned a seriousness rating of “major” because of the severe malodorous conditions caused by the hydrogen sulfide emissions, and a conduct rating of “moderate” because there had been no prior history of such emissions from the

Fenimore Landfill. According to the penalty matrix at N.J.A.C. 7:26-5.5, the penalty range for a violation of major seriousness and moderate conduct is $30,000 to $40,000. The Department assessed the penalty at the midpoint of $35,000 as required by the regulation. As to the January and February 2013 violations, which corresponded to the February 22, 2013, and March 15, 2013, Notices of Violation, the Department assigned a seriousness rating of "major" for the same reason as noted above, but elevated the conduct rating to "major" because SEP and Richard Bernardi at that point had a history of repeat violations and because both Respondents should have been actively mitigating the odors as set forth in the Closure Plan. The penalty range for a violation of major seriousness and major conduct is $40,000 to $50,000. The Department assessed the penalty at the midpoint of $45,000 as required by the regulation.

The penalties assessed under the SWMA AONOCAPA totaled $99,000. As discussed above, the Department amended the AONOCAPA by motion in the OAL to add Marilyn Bernardi as a responsible party. The facts supporting the dust, odor, and access violations were not contested by Respondents and are clearly supported by the record. The ALJ concluded, and I agree, that the Department has proven by a preponderance of the credible evidence that the violations occurred. Based on the testimony of the Department's witnesses, the ALJ concluded, and, with the exception of the access violations, I agree, that the penalties were assessed appropriately and in accordance with the applicable regulations. Respondents did not file exceptions to challenge the ALJ's conclusions. On further review, I find that the penalties for the access violations must be modified.

In assessing the penalties for the access violations, the Department cited N.J.A.C. 7:26G-2.7, which establishes civil administrative penalties for the refusal to provide access to a hazardous waste facility, rather than N.J.A.C. 7:26-5.7, which governs civil administrative penalties for the refusal to provide access to a solid waste facility. The two regulations are similarly constructed and contain

identical language. Like N.J.A.C. 7:26G-2.7, N.J.A.C. 7:26-5.7(c)2 establishes a penalty range of $3,000 to $5,000 for refusal to provide access. The Department assessed the penalty at the $4,000 midpoint of the range for both of Respondents' access violations in December 2012. Thus, notwithstanding the penalty regulation citation error, the Department did assess the correct base penalty for the access violations.[7] For the first access violation, the Department increased the base penalty by 50% because of Respondents' prior violation of the dust regulation. For the second access violation, the Department increased the penalty by 50% for the dust violation and 100% because of Respondents' prior violations of the same access regulation. These increases were applied in accordance N.J.A.C. 7:26-5.4(f) and resulted in penalties of $6,000 and $10,000. However, the adjustment provisions in N.J.A.C. 7:26-5.4(f) are not applicable to penalties assessed under N.J.A.C. 7:26-5.7. N.J.A.C. 7:26-5.7 itself contains an adjustment provision that states: "The Department may adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of the following factors . . . ." N.J.A.C. 7:26-5.7(d). The factors to be considered include, among other things, the compliance history of the violator. Ibid. Thus, once the Department determined the base penalty of $4,000, the maximum penalty that could have been assessed for each access violation, taking into account Respondents' prior violations, was $5,000. Whereas the total penalty for the two access violations assessed in the SWMA AONOCAPA was $16,000 ($6,000 plus $10,000), the proper total determined under the applicable regulation is $10,000 ($5,000 plus $5,000). The overall $99,000 SWMA penalty is thus properly reduced by

[7] Under N.J.A.C. 7:26-5.7(c)1, the Department could have assessed a penalty between $20,000 and $30,000 for Respondents' failure to grant the Department access despite being required to do so by statute, regulation, the ACO, and the Closure Plan. Nevertheless, the Department exercised its discretion and applied the lower penalty range found at N.J.A.C. 7:26-5.7(c)2.

$6,000. Based on those considerations, I MODIFY the initial decision to set the penalties imposed under the SWMA AONOCAPA at $93,000 rather than $99,000.

*Liability against corporate and individual respondents*

The ALJ's finding of liability against SEP for the violations cited in the SWMA AONOCAPA was proper because SEP is the owner and operator of the Fenimore Landfill and because it is bound by the ACO and the Closure Plan. The ALJ's finding of liability against Richard Bernardi, individually, was also proper because Richard Bernardi is not a member of SEP and is thus not entitled to whatever protection SEP's corporate shield may provide. Mr. Bernardi bound himself to be individually responsible for the Fenimore Landfill and the Closure Plan by executing the ACO in his personal capacity, and he was personally involved in the day-to-day operations of the Fenimore Landfill when the violations occurred. A finding of individual liability against Marilyn Bernardi, however, requires additional analysis.

The responsible corporate officer doctrine dictates that individual liability for corporate violations may be imposed on an officer when the statute governing the violations allows corporate officer liability and when the corporate officer was either in control of the events leading to the violations or was in a position to prevent the violations from occurring. See Dep't of Environmental Protection v. Standard Tank Cleaning Corp., 285 N.J. Super. 381, 401-03 (App. Div. 1995); see also Asdal Builders, LLC v. Dep't of Environmental Protection, 426 N.J. Super. 564, 579 (App. Div. 2012). As found by the ALJ, Marilyn Bernardi was at all times the sole member, corporate officer, and/or principal of SEP. She, in that capacity, authorized Richard Bernardi to act on behalf of SEP and to operate the Fenimore Landfill. Marilyn Bernardi was aware of Richard Bernardi's actions and of the violations occurring at the Fenimore Landfill, yet she did not take any action to prevent

them, despite being in a position to do so as the sole corporate officer and despite having regular contact with Richard Bernardi.

The SWMA regulations specifically provide that responsible corporate officers can be held liable for a corporation's violations. N.J.A.C. 7:26-1.4. Because Marilyn Bernardi was and continues to be the sole corporate officer of SEP, and because she failed to take any action to prevent her corporation's violations at the Fenimore Landfill, I concur with the ALJ's determination to apply the responsible corporate officer doctrine and hold Marilyn Bernardi individually liable for violations charged in the SWMA AONOCAPA. I thus ACCEPT the ALJ's determination of liability for the violations cited and penalties assessed in the SWMA AONOCAPA against SEP, Richard Bernardi, individually, and Marilyn Bernardi, individually, in the amount as MODIFIED herein of $93,000.

APCA AONOCAPAs

The APCA authorizes the Department to, among other things, promulgate such rules and regulations as are necessary to prevent, control, and prohibit the dissemination of air pollution throughout New Jersey. N.J.S.A. 26:2C-8. Like the SWMA, the APCA is a strict liability statute such that, in order to impose a penalty, the Department need only prove, by a preponderance of the credible evidence, that the proscribed act was committed. See Dep't of Environmental Protection v. Alden Leeds, Inc., 153 N.J. 272, 284-85 (1998). The Department has promulgated, among other regulations implementing the APCA, the regulations set forth in N.J.A.C. 7:27-1.1 through -34.5, as well as the air administrative procedures and penalty regulations set forth in N.J.A.C. 7:27A-3.1 through 3.12. Air pollution is specifically proscribed by N.J.A.C. 7:27-5.2(a), which provides:

> . . . [N]o person shall cause, suffer, allow or permit to be emitted into the outdoor atmosphere substances in quantities which shall result in air pollution as defined herein.

"Air pollution" is, in relevant part, defined as the presence in the atmosphere of air contaminants in such quantity or duration as would "unreasonably interfere with the enjoyment of life or property throughout the State . . . ." N.J.A.C. 7:27-5.1.

As discussed previously, the Department issued 10 APCA AONOCAPAs to Respondents for numerous instances of hydrogen sulfide odor emissions from the Fenimore Landfill throughout 2012 and 2013. During that time, the Department received at least 2,500 odor complaints from the citizens of Roxbury Township. The AONOCAPAs addressed 167 of the complaints that were verified by Department inspectors, who visited the respective individual complainants' properties, confirmed the presence of hydrogen sulfide odors, and confirmed that the Fenimore Landfill was the source of the odors. Based on the uncontroverted testimony of the Department's witnesses at the hearings, the ALJ affirmed the Department's determination that hydrogen sulfide odors were emitted from the Fenimore Landfill and had extreme and unreasonable effects on the citizens of Roxbury, including, among other things, physical illness, the inability to go outside, and the inability to entertain guests or have children on the property while the odors were present.

In the APCA AONOCPAs, the Department assessed a total of $775,000 in civil administrative penalties against Respondents. Respondents challenged each AONOCAPA, and the challenges were consolidated in the OAL. Eight of the AONOCAPAs were issued only to Richard Bernardi and SEP. In the OAL, the Department moved to amend each of these eight AONOCAPA to also name Marilyn Bernardi. The ALJ granted the motion.

Other than Respondents' claim that the APCA is unconstitutionally vague and their claim that the Department should have used hydrogen sulfide measuring instruments during its inspections, Respondents have not substantively challenged any of the APCA AONOCAPAs.

Respondents' claim that the APCA is unconstitutionally vague focuses on one particular phrase in the APCA's definition of air pollution: "unreasonably interfere[s] with the enjoyment of life or property." Respondent contend that the phrase creates a "moving line" from which it is difficult for potential violators to discern what conduct is prohibited. Respondents assert that what unreasonably interferes with one person's enjoyment of life or property may differ from what unreasonably interferes with another's, and thus there is no concrete standard to apply. In his Initial Decision, however, the ALJ properly recognized that the question of whether the air pollution definition, and the specific phrase Respondents point to, is unconstitutionally vague has been resolved by New Jersey courts multiple times in favor of constitutionality. See Dep't of Environmental Protection v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 385-87 (App. Div. 1968), aff'd, 53 N.J. 248 (1969). In Owens-Corning Fiberglass, when discussing the defendant's claim that the APCA does not properly inform manufacturers what may or may not be emitted into the State's air, the Appellate Division concluded:

> There is a plain answer to defendant's claim that the [APCA] lacked specificity in that it failed to inform it with particularity as to the nature of its offending activity. The activity was and remains air pollution.

Id. at 387. Since the decision in Owens-Corning Fiberglass, our courts have had other opportunities to rule on the same vagueness arguments Respondents press here. The result has been the same. See, e.g., Div. of Environmental Quality v. Norel Plastics Corp., No. A-2755-87T8 (App. Div. May 4, 1989)(slip op. at 7-9)(upholding N.J.A.C. 7:27-5.1 and 5.2 and reinforcing the court's prior

decision in Owens-Corning Fiberglass to uphold the APCA's definition of air pollution).[8] Because Respondents' constitutionality arguments have already been addressed and rejected by the New Jersey courts, I concur in the ALJ's determination to reject those arguments in this matter. I further concur in the ALJ's conclusion that the arguments were brought in the wrong forum. Challenges to the overall constitutionality of a statute are properly brought in the Appellate Division, not the OAL. See R. 2:2-3(a); Wendling v. N.J. Racing Commission, 279 N.J. Super. 477, 485 (App. Div. 1995).

I also concur with the ALJ's determination to reject Respondents' argument that the Department should have utilized hydrogen sulfide measuring instruments when investigating the Roxbury citizens' odor complaints. Other than noting that the Department was in possession of such equipment, Respondents have not presented any legal basis for their contention. As the ALJ found, odor, as a quality that stimulates the olfactory organ, is properly detected through the use of human senses. As discussed above, the uncontroverted testimony of the Department's witnesses demonstrates that hydrogen sulfide odors were emitted from the Fenimore Landfill and unreasonably interfered with the Roxbury citizens' enjoyment of their life and property. The Roxbury citizens experienced the negative effects of those odors through their senses, and the source of the odors was, properly, confirmed by Department inspectors through the use of their senses as well.

Having disposed of the Respondents' general arguments, I now turn to a discussion of the merits of each APCA AONOCAPA.

*December 6, 2012 APCA AONOCAPA*

On December 6, 2012, the Department issued to Richard Bernardi and SEP an AONOCAPA for two violations of N.J.A.C. 7:27-5.2(a) for hydrogen sulfide odor emissions at the Fenimore

[8] A copy of this decision is attached to the Department's post-hearing reply brief.

Landfill confirmed by Department inspectors on November 21 and 30, 2012, which were previously cited in a Notice of Violation issued December 3, 2012. The Department assessed two penalties in accordance with the air administrative procedures and penalty regulations. N.J.A.C. 7:27A-3.10(m)5 establishes a $1,000 penalty for first offenses of N.J.A.C. 7:27-5.2(a) and authorizes the adjustment of that penalty based upon certain conditions, including the population affected by the violation, any remedial measures taken by the violator, and the compliance history of the violator. The $1,000 base penalty for the November 21, 2012, violation was reduced by 50% to $500 because there had been no air pollution violations at the Fenimore Landfill within the previous five years. The $1,000 base penalty for the November 30, 2012, violation was reduced by 50% to $500 because there had been no prior air violations, but a 10% increase was then applied because that particular violation stemmed from three verified complaints.[9] The resulting penalty was $600. The Department thus assessed a total penalty of $1,100 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties in the AONOCAPA were properly calculated. I concur.

*December 28, 2012 APCA AONOCAPA*

On December 28, 2012, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for hydrogen sulfide odor emissions at the Fenimore Landfill on December 7, 9, 10, 15, 17, 18, 20, 23, 24, 26, and 27, 2012. The Department treated the December 7, 9, 10, 15, 17, and 18, 2012, violations as first violations under N.J.A.C. 7:27A-

[9] N.J.A.C. 7:27A-3.10(m)5 states that a penalty calculated thereunder may be increased by 10% where the population affected consists of three to five complainants, by 15% where the population affected consists of six to10 complainants, and by 20% where the population affected consists of greater than 10 complainants.

3.10(m)5 because Richard Bernardi and SEP had not yet received the first AONOCAPA and, accordingly, assessed a base penalty of $1,000 for each. The December 7, 9, and 18, 2012, penalties were not adjusted. The December 10, 15, and 17, 2012, penalties were increased by 10% to $1,100 because each violation stemmed from three verified complaints. The Department treated the December 20, 23, 24, 26, and 27, 2012, violations as second violations because it had confirmed receipt by Richard Bernardi and SEP of the first AONOCAPA and, accordingly, assessed a base penalty of $2,000 for each.[10] The December 20 and 24, 2012, penalties were increased by 10% to $2,200 because each violation stemmed from three to five verified complaints. The December 23, 26, and 27, 2012, penalties were not modified. The Department thus assessed a total penalty of $16,700 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties in the AONOCAPA were properly calculated. I concur.

*March 14, 2013 APCA AONOCAPA (originally issued January 4, 2013)*

On January 4, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on December 29, 2012, and January 2, 2013. This AONOCAPA was amended and reissued on March 14, 2013, to correct a penalty calculation error. The Department treated these violations as second offenses under N.J.A.C. 7:27A-3.10(m)5 because, at the time of each violation, only one AONOCAPA had been received by Respondents and, accordingly, assessed a base penalty of $2,000

[10] According to the testimony of the Department's witnesses, the base level for a penalty pursuant to N.J.A.C. 7:27A-3.10(m)5 is established by the number of AONOCAPAs actually received by a violator rather than by the number of violations that previously occurred. For instance, if a violator had previously received two AONOCAPAs, the next offense would be a third offense for purposes of calculating a base penalty under N.J.A.C. 7:27A-3.10.

for each. The December 29, 2012, penalty was increased by 10% to $2,200 because the violation stemmed from four verified complaints. The January 2, 2013, penalty was not modified. The Department thus assessed a total penalty of $4,200 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties in the AONOCAPA were properly calculated. I concur.

*February 21, 2013 APCA AONOCAPA*

On February 21, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on January 30, 2013 and February 7, 9, and 10, 2013. The Department treated the January 30, 2013, violation as a third offense because Richard Bernardi and SEP had received both the December 3, 2012, AONOCAPA and December 28, 2012, AONOCAPA and, accordingly, assessed a base penalty of $5,000. The penalty was not modified. The Department treated the February 7, 9, and 10, 2013, violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received three separate AONOCAPAs at that point (the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the January 4, 2013, AONOCAPA (later amended on March 14, 2013)) and, accordingly, assessed a base penalty of $15,000 for each. The February 7 and 9, 2013, penalties were increased by 15% because each violation stemmed from six verified complaints. The February 10, 2013, penalty was increased by 10% because the violation stemmed from three verified complaints. The resulting penalties were $17,250, $17,250, and $16,500, respectively. The Department thus assessed a total penalty of $56,000 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*March 4, 2013 APCA AONOCAPA*

On March 4, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on January 8, 2013, and February 14, 19, and 23, 2013. The Department treated the January 8, 2013, violation as a third offense under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received both the December 3, 2012, AONOCAPA and December 28, 2012, AONOCAPA and, accordingly, assessed a base penalty of $5,000.The penalty was increased by 15% to $5,750 because the violation stemmed from nine verified complaints. The Department treated the February 14, 19, and 23, 2013 violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received three separate AONOCAPAs at that point (the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA and the January 4, 2013, AONOCAPA (later amended on March 14, 2013)) and, accordingly, assessed a base penalty of $15,000 for each. The February 14, 2013 penalty was increased by 15% to $17,250 because the violation stemmed from eight verified complaints. The February 19, 2013, penalty was not modified. The February 23, 2013, penalty was increased by 10% to $16,500 because the violation stemmed from four verified complaints. The Department thus assessed a total penalty of $54,500 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*March 25, 2013 APCA AONOCAPA*

On March 25, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on February 15, 21, 22, 26, and 27, 2013 and March 10 and 18, 2013. The Department treated all of the violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received three separate AONOCAPAs at that point (the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the January 4, 2013, AONOCAPA (later amended on March 14, 2013)) and, accordingly, assessed a base penalty of $15,000 for each. None of those penalties were modified. The Department thus assessed a total penalty of $105,000 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*April 18, 2013 APCA AONOCAPA*

On April 18, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on March 6, 14, and 21, 2013, and April 8, 11, 12, and 15, 2013. The Department treated all of the violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received at least three AONOCAPAs at that point (among others, the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the February 21, 2013 AONOCAPA) and, accordingly, the Department assessed a base penalty of $15,000 for each. The March 6, 14, and

21, 2013, penalties were not modified. Nor were the April 8 and 12, 2013, penalties. The April 11 and 15, 2013, penalties were each increased by 10% because the violations each stemmed from three to five verified complaints. The Department thus assessed a total penalty of $108,000 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*May 8, 2013 APCA AONOCAPA*

On May 8, 2013, the Department issued an AONOCAPA to Richard Bernardi and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on April 18, 22, and 23, 2013. The Department treated all of the violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Richard Bernardi and SEP had received at least three AONOCAPAs at that point (among others, the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the February 21, 2013, AONOCAPA) and, accordingly, the Department assessed a base penalty of $15,000 for each. The April 18 and 22, 2013, penalties were not modified. The April 23, 2013, penalty was increased by 10% because the violation stemmed from four verified complaints. The Department thus assessed a total penalty of $46,500 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*June 3, 2013 APCA AONOCAPA*

On June 3, 2013, the Department issued an AONOCAPA to Richard Bernardi, Marilyn Bernardi, and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on April 25, 26, and 29, 2013, and on May 3, 7, 8, 9, 14, 17, and 19, 2013. (This was the first APCA AONOCAPA issued against all Respondents.) The Department treated all of the violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Respondents had received at least three AONOCAPAs at that point (among others, the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the February 21, 2013 AONOCAPA) and, accordingly, the Department assessed a base penalty of $15,000 for each. The April 26 and 29, 2013, penalties and the May 8, 14 and 17, 2013, penalties were not modified. The April 25, 2013, penalty and the May 3, 7, 9 and 19, 2013, penalties were increased by 10% because each violation stemmed from three to five verified complaints.

In this AONOCAPA, the Department also cited the violation of N.J.A.C. 7:27A-3.5(a) for failure to comply with a prior order, noting specifically Respondents' failure to immediately cease all malodorous emissions from the Fenimore Landfill in accordance with the May 8, 2013, AONOCAPA. The Department assessed a $10,000 penalty for this violation as a first offense. The Department thus assessed a total penalty of $167,500 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

*July 17, 2013 APCA AONOCAPA*

On July 17, 2013, the Department issued an AONOCAPA to Richard Bernardi, Marilyn Bernardi, and SEP for violations of N.J.A.C. 7:27-5.2(a) for confirmed hydrogen sulfide odor emissions at the Fenimore Landfill on May 28, 2013 and on June 4, 5, 6, 8, 10, 12, 13, 15, 16, 17, and 19, 2013. The Department treated all of the violations as fourth offenses under N.J.A.C. 7:27A-3.10(m)5 because Respondents had received at least three AONOCAPAs at that point (among others, the December 3, 2012, AONOCAPA, the December 28, 2012, AONOCAPA, and the February 21, 2013, AONOCAPA) and, accordingly, the Department assessed a base penalty of $15,000 for each. The May 28, 2013, penalty and the June 4, 13, 16, and 17, 2013, penalties were not modified. The June 5, 6, 8, 10, 12, 15, and 19, 2013, penalties were increased by 10% because each violation stemmed from three to five verified complaints.

In this AONOCAPA, the Department also cited the violation of N.J.A.C. 7:27A-3.5(a) for failure to comply with a prior order, noting specifically Respondents' failure to immediately cease all malodorous emissions from the Fenimore Landfill in accordance with the June 6, 2013, AONOCAPA. This was the second violation of N.J.A.C. 7:27A-3.5(a) for failure to comply with a prior order and, accordingly, the Department assessed a $25,000 penalty for it as a second offense. The Department thus assessed a total penalty of $215,500 in this AONOCAPA.

The ALJ determined, based on uncontroverted witness testimony and documentary evidence, that the cited violations occurred and that the corresponding penalties were properly calculated. I concur.

Based on the above analysis of the AONOCAPAs and my review of the record, I concur with the ALJ's determination that the Department has proven by a preponderance of the credible evidence that each of the violations cited in the APCA AONOCAPAs did occur. I also concur that the civil

administrative penalties assessed in the APCA AONOCAPAs totaling $775,000 were calculated correctly.

*Liability against corporate and individual respondents*

The ALJ's finding of liability against SEP for each of the APCA AONOCAPAs was proper because SEP is the owner and operator of the Fenimore Landfill. The finding of liability against Richard Bernardi, individually, was also appropriate because Richard Bernardi is not a member of SEP and is thus not entitled to whatever protection SEP's corporate shield may provide. Mr. Bernardi bound himself to be individually responsible for the Fenimore Landfill by executing the ACO in his personal capacity, and he was personally involved in the day-to-day operations of the Fenimore Landfill when the violations occurred. As with finding Marilyn Bernardi individually liable for the violations in the SWMA AONOCAPA, however, a finding of individual liability against Marilyn Bernardi for the violations in the APCA AONOCAPAs requires additional analysis.

The responsible corporate officer doctrine is not available to the Department for purposes of asserting individual liability against Marilyn Bernardi for the APCA AONOCAPAs because the definition of "person" in the APCA and its implementing regulations does not include corporate officers. As discussed in Asdal Builders, supra, 426 N.J. at 579, this is fatal to any analysis of individual officer liability in the context of the APCA and the responsible corporate officer doctrine. I therefor REJECT the ALJ's determination to impose individual liability on Marilyn Bernardi for the APCA AONOCAPAs pursuant to the responsible corporate officer doctrine.

In addition to the responsible corporate officer basis for finding individual liability, the Department argued that the doctrine of piercing the corporate veil allowed a finding of individual liability against Marilyn Bernardi. Whereas the application of the responsible corporate officer

doctrine requires explicit statutory or regulatory authority for attaching liability to individual corporate officers, the doctrine of piercing the corporate veil is a common law doctrine that requires no such authority and begins with the basic premise that a corporation is a legal entity separate and apart from its stockholders and officers. Lyon v. Barrett, 89 N.J. 294, 300 (1982). When fraud or injustice so requires, courts can and will pierce a corporate veil to impose liability on corporate officers. Ibid; see also Frank v. Frank's Inc., 9 N.J. 218, 224 (1952); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 254-54 (Ch. Div. 1972); Yacker v. Weiner, 109 N.J. Super. 351, 356 (Ch. Div. 1970), aff'd o.b., 114 N.J. Super. 526 (App. Div. 1971).

The type of fraud or injustice that must be demonstrated in order to pierce the corporate veil tends to go to the purpose and formation of the corporation in the first place, as well as the manner in which the corporate form was used and the corporate business conducted as they relate to the particular violations and corporate officers at issue. It is, in that regard, a highly fact-sensitive analysis. For example, in Telis v. Telis, 132 N.J.Eq. 25 (E & A. 1942), cited by the Supreme Court in Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 500 (1983), the court determined to pierce the corporate veil because it found that the defendant officer had formed the corporation for the purpose of concealing marital assets from his wife during divorce proceedings and because the corporation itself was inappropriately operated, ignoring all the usual corporate formalities. Similarly, in Trachman v. Trugman, 117 N.J.Eq. 167, 168-70 (Ch. 1934), also cited in Ventron, the court determined to pierce the corporate veil as a result of its finding that the defendant officer had fraudulently transferred his assets into a newly-formed corporation for the purposes of avoiding his creditors. In both those cases one thing was clear, the corporations formed by the individual defendants were shams. "Where the corporate form is used by individuals for the purpose

of evading the law, or for the perpetration of fraud, the courts will not permit the legal entity to be interposed so as to defeat justice." Trachman, supra, 117 N.J. Eq. at 170.

Here, while it might be argued that SEP was initially formed by Marilyn Bernardi for a legitimate business purpose, i.e., purchasing and closing the Fenimore Landfill to ultimately operate it as a solar farm, any legitimacy ceases there. Respondents' fraudulent activity, much of which was committed by Marilyn Bernardi's husband with her consent and knowledge, dominated the remainder of SEP's involvement with the Fenimore Landfill. The ALJ's findings, which were not contested by Respondents and are supported by the record, demonstrate the following instances of fraudulent activity as it relates to Marilyn Bernardi, SEP, and the Fenimore Landfill:

- Richard Bernardi was never an employee, officer, member, independent contractor or consultant of SEP, and yet Marilyn Bernardi, as the sole officer of SEP, authorized him to sign legal documents, including the mortgage agreement used to purchase the Fenimore Landfill, on behalf of SEP, naming himself as, variously, the "Manager," "Director and Managing Member," "Director," and "President" of SEP.

- Marilyn Bernardi allowed Richard Bernardi to enter into the ACO with the Department and obtain the Closure Plan knowing he was not an officer of SEP, knowing the documents submitted by SEP to the Department contained misrepresentations regarding corporate assets and liabilities, and knowing the corporation had no intention of complying with the requirement in the ACO and Closure Plan that SEP deposit tipping fees into an escrow account that was intended to fund the proper closure of the Fenimore Landfill.

- Marilyn Bernardi, as the sole corporate officer of SEP and with awareness of its obligations, set up an escrow account for tipping fees and yet established a plan with Richard Bernardi to not deposit a single tipping fee in it, thus depriving SEP of funds.

- Marilyn Bernardi, being fully aware of the constant violations of the APCA at the Fenimore Landfill over the course at least nine months, permitted Richard Bernardi to continue to operate the Fenimore Landfill in an inappropriate manner and in direct contravention of the APCA, the ACO and the Closure Plan, despite the fact that Richard Bernardi was never an officer or employee of SEP.

- Marilyn Bernardi, as the sole corporate officer of SEP, signed a check transferring $275,000 to her personal pension plan from SEP's corporate assets

> on September 13, 2013, after the Department had already issued 11 AONOCAPAs against SEP, Richard Bernardi and her, assessing penalties of over $800,000.

The fraudulent activities of the Respondents, and particularly of Marilyn Bernardi, run the gamut. They pervade every aspect of SEP's ownership and operation of the Fenimore Landfill. Marilyn Bernardi, with the aid of her husband, deliberately deprived the corporation and its escrow account of the funds needed to close the Fenimore Landfill in accordance with the provisions of the SWMA, the APCA, the ACO and the Closure Plan, including, most importantly, the requirement that all malodorous emissions be controlled through the use of clean soil cover. Marilyn Bernardi even went so far as to defund SEP by depositing corporate assets into her own pension plan with full knowledge of the civil administrative penalties recently assessed by the Department against her and her corporation. It would be inequitable to permit Marilyn Bernardi to escape personal liability for the penalties assessed in the APCA AONOCAPAs by acknowledging the corporate form that she so frequently abused. I thus concur in the ALJ's determination to impose individual liability on Marilyn Bernardi for the penalties assessed in the APCA AONOCAPAs. I ACCEPT the ALJ's determination of liability for the violations cited and the penalties assessed in the APCA AONOCAPAs against SEP, Richard Bernardi, individually, and Marilyn Bernardi, individually, in the amount of $775,000.

## CONCLUSION

Based on my review of the record, I ADOPT the ALJ's Amended Initial Decision for the reasons therein and above. I MODIFY the Amended Initial Decision to reduce the penalty assessed in the SWMA AONOCAPA from $99,000 to $93,000. I ACCEPT the ALJ's finding of individual liability against Marilyn Bernardi for the SWMA AONOCAPA on the basis of the responsible

corporate officer doctrine. However, I REJECT the ALJ's finding of individual liability against Marilyn Bernardi for the APCA AONOCAPAs on the basis of the responsible corporate officer doctrine, and MODIFY the Amended Initial Decision accordingly. In the alternative, I ACCEPT the ALJ's finding that the doctrine of piercing the corporate veil supports individual liability against Marilyn Bernardi for the violations cited in the APCA AONOCAPAs.

Respondents are hereby directed to pay the civil administrative penalties due under the SWMA AONOCAPA, as MODIFIED herein, totaling $93,000, and to pay the civil administrative penalties due under the APCA AONOCAPAs totaling $775,000 within thirty (30) days from the date of this Final Decision as set forth in the respective AONOCAPAs and their invoices.

IT IS SO ORDERED.

DATED: February 17, 2016

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION
v.
STRATEGIC ENVIRONMENTAL PARTNERS, LLC,
RICHARD BERNARDI, INDIVIDUALLY, and
MARILYN BERNARDI, INDIVIDUALLY.

OAL DKT. NOS. ECE 05826-13, ECE 05827-13, ECE 05829-13,
ECE 05833-13, ECE 05834-13, ECE 05835-13, ECE 08169-13, ECE 08170-13,
ECE 09037-13, ECE 11115-13, and ECE 12451-13
AGENCY REF. NOS. PEA 13008-26889, 130007-28889,
130006-26889, 130005-26889, 130004-26889, 130003-26889, 130002-26889,
120005-26889, 120003-26889, 120002-26889, and 130005-132518

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